Feb 21 1878

Bullets

The Capitol

60 0 0 7 4 0 4

Oct. 3. 1877

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 199.

JOHN D. McPHERSON, APPELLANT,

vs.

MARY A. COX.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 12, 1875.

Jan 23 1878

Duncan K

Jas Miller

SUPREME COURT OF THE UNITED STATES.

No. 199.

JOHN D. McPHERSON, APPELLANT,

vs.

MARY A. COX.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Bill of complaint	1	1
Exhibits A and B	10-14	5
Summons to answer	15	8
Amended bill of complaint	16	8
Exhibit to	17	9
Answer to bill	21	11
Supplemental bill	34	18
Exhibit A to	40	21
Answer to	45	24
Answer to Exhibit No. 1 to	55	29
Answer to Exhibit No. 2	56	30
Replication	57	30
Second supplemental bill	57	30
Exhibit to	59	31
Answer to	60	32
Third supplemental bill	63	34
Answer to	65	35
DEPOSITIONS.		
Testimony of Samuel Ford	67, 73	36, 39
Charles Ford	72, 139	39, 74
James F. Benedict	74, 137	40, 73
James T. Pike	81, 133	44, 71
C. H. Holden	84	45
J. M. Carlisle	94, 140	50, 74
Mary A. Cox	102	54
Walter S. Cox	130	69
C. Storrs	134	71

	Original.	Print.
Testimony of John D. McPherson	140, 157	74, 84
F. W. Pratt	155	83
A. G. Riddle	160	85
Exhibits	162	86
Decree of special term	171	91
Appeal to general term	173	92
Decree of general term	173	93
Appeal to the Supreme Court of the United States	174	93
Bond of appeal to the Supreme Court of the United States	175	93
Clerk's certificate	176	94

1 *Bill.—Filed June* 11, 1873. *R. J. Meigs, clerk.*

In the supreme court of the District of Columbia. In equity.

MARY A. COX, COMPLAINANT,
vs.
JOHN D. MCPHERSON, DEFENDANT. } 3268. Equity docket 12.

To the honorable the supreme court of the District of Columbia, holding an equity court for said District:

The complainant brings this her bill of complaint in equity against the defendant, (Jno. D. McPherson,) and hereby complaining, represents and alleges as follows:

1. That she is a widow woman, citizen of and resident in the District of Columbia.

2. That the defendant is an attorney and counsellor at law and of this court, citizen of and resident of the District of Columbia, of the firm of Carlisle & McPherson.

3. That on the 26th of November, in the year of our Lord one thousand eight hundred and seventy, the complainant was the owner in fee-simple, and seized and actually possessed of the lands and tenements hereinafter described, in the city of Washington, in said District, that is to say, all that certain piece or parcel of land situate in the city aforesaid, and known and designated on the public plat of said city as square numbered three hundred and twelve, (312,) so bounded and described, and containing such quantity of land as by the said public plat
2 appears, with the buildings and improvements, rights, privileges, and appurtenances and the hereditiments to the same belonging or appertaining.

4. That on the same twenty-sixth day of November, in the year of our Lord one thousand eight hundred and seventy, she sold the said land and tenements to Charles H. Holden, Charles W. King, and Samuel Ford for the sum, price, and consideration of thirty-eight thousand dollars, to be paid to her on or before the twenty-sixth day of November, in the year of our Lord one thousand eight hundred and eighty, with interest on that sum, payable annually, year by year, and every year, from the 26th of November, 1871, to the 26th of November, 1880, inclusive, with the right to pay said principal sum in instalments of not less than three thousand dollars each, whenever they might elect.

5. That upon the said day of sale the complainant gave possession of said lands and premises to her said vendees, and made, executed, and delivered to them her deed of conveyance thereof in fee-simple, in due form of law.

6. That on the same day of said sale and conveyance the said vendees made and executed to her, and to her delivered their bond for the payment of the said principal sum and interest, in accordance with the terms of sale, as the same are in the 4th paragraph above stated.

7. That as a part of the said contract of sale, and a condition of the making of said conveyance, it was at the time when agreed between the complainant and her said vendees that they should, simultaneously with the making of said deed, convey the said lands and tenements to trustees, to secure the payment, promptly and punctually, of the said principal sum and the several annual instalments of interest thereon, with the power of sale upon default of payment, and with certain other stipulations on said conveyance on trust, collateral to the said obligation, to be
3 expressed. And thereupon the complainant selected to be one of

said trustees, the defendant, John D. McPherson, then her counsel, with the said James M. Carlisle, and the said vendees selected Jesse B. Wilson.

8. That thereupon the said Charles H. Holden, Charles W. King, and Samuel Ford, with their wives, then, there, and simultaneously, with the making and delivery of her said conveyance to them, did make and execute, sign, seal, and deliver unto the said (John D. McPherson and Jesse B. Wilson) their indenture, of date the said 26th day of November, A. D. 1870, whereby, reciting that the vendees were indebted to the complainant, trustee under the will of William Cox, in the said sum of thirty-eight thousand dollars, payable as aforesaid, with interest, payable as aforesaid, and with the right to pay the principal by instalments as aforesaid, the said vendees and their wives did grant, bargain, sell, alien, enfeoff, release, and convey unto said defendant and the said Jesse B. Wilson, and the survivors, the lands and tenements aforesaid, as the same are above described, and all their estate, and right, title, claim, and interest thereon and thereto, to have and to hold the said lands and tenements and the appurtenances unto the said John D. McPherson and Jesse B. Wilson, the survivor of them and the heirs of said survivor, forever.

9. Which deed of indenture, of grant, bargain, and sale was therein and thereby declared to be made upon certain trusts, that is to say:

First. To permit the said Holden, King, and Ford, their heirs or assigns, to use and occupy the granted premises, and the rents, issues, and profits thereof, to take, have, and use until default in payment of the said principal sum, or of some instalment of the interest thereon.

Second. Upon payment of any instalments of the principal to release to the said vendees any part of the said square which they should designate in the proportion of two square feet of ground for every three dollars so paid.

4 Third. On full payment of said principal sum, and of the interest thereon, and all the proper costs, charges, commissions, and expenses incurred in pursuance of the said trust, to release the said lands and tenements altogether.

Fourth. Upon default in the payment of the principal sum, or of any interest due on the same, to sell at public auction, on such terms and after such notice as the said trustees or trustee might deem proper, so much of the said lands and tenements as they or he might deem necessary to pay the sum due; and out of the proceeds to pay, first, costs and expenses of sale and usual commissions of the trustees; second, the moneys that might be due the complainant; and, third, the residue, if any, to the said vendees.

10. That the said conveyance in trust was duly executed, acknowledged, and recorded, and to the said trustees delivered, who, on the same day of the date, accepted the trusts thereby created; and both still live and are such trustees.

11. That since the execution of the said deed of trust the said Charles H. Holden and Charles W. King have ceded and conveyed their interests in said lands and tenements to the said Samuel Ford, and he has sold portions thereof, paying the complainant two thousand dollars for her release of part of the lots sold, and she, by the advice of the said John D. McPherson, releasing her charge upon other of the lots so sold, without payment of any instalments of said principal sum, and without any other consideration than the prospective increase of value of the remaining lots, to arise from the improvements of those released.

12. That another portion of said lands and tenements has been sold,

and the purchaser has assumed and secured the payment to the complainant of a part of the principal sum, and of a corresponding part of the annually-to-accrue interest thereon, leaving payable by the said
5 Samuel Ford of such interest, the sum of one thousand three hundred and eighty dollars per annum, the said purchaser owing $730 per annum.

13. That of his proportion of such interest for the year that ended on the 25th of November, 1872, there remains unpaid from the said Ford to the complainant the sum of eight hundred and eighty dollars, and there will be due, on the same day of the present year, the further sum of $1,380.

14. That the interest accruing on said principal sum unpaid of thirty-six thousand dollars is, has been, and must continue to be the only income and absolutely the only means of support of the complainant and of those who are dependent on her.

15. That this fact that the said interest has been, is, and must continue to be her only income and means of living, is, and has all the time been perfectly well known to the said John D. McPherson, who had been her counsel for some years before said sale, was perfectly well acquainted with her circumstances, and, with his partner, had professed and seemed to be her friends.

16. That yet the said defendant, knowing that it would deprive her of the means of paying her rent and of purchasing food, did, about three months ago, without right to do so, or possible pretence of right, cruelly and maliciously, out of ill-will and dislike, twice notify the said Ford to pay to complainant nothing more on account of such interest, without consulting him; and the said Ford, being his client in other matters, readily obeyed the notification and order, and has since then refused and still refuses to pay the complainant the said sum of eight hundred and eighty dollars, or any part of the same; and if the said McPherson continues to be trustee will fail and refuse to pay the interest for the present year when it becomes due. Whereby the said McPherson has caused her great distress, need, embarrassment, and humiliation, and is unfit longer to be her trustee.

6 17. That it was the duty of the said John D. McPherson to see to it that the said interest was punctually paid, and upon default thereof to compel payment by execution, if necessary, of the power of sale; instead thereof he has, uninvited, thrust himself in between her and his client, her debtor, and required her debtor to defraud, wrong, and distress her, and withheld her daily bread and means of sustaining the life of children.

18. That the said Samuel Ford has permitted a large amount of taxes and assessments upon the parts of said land and tenements still held by him to accumulate unpaid since the 1st day of August, 1871; in consequence of the non-payment of $630.07, part thereof, lots 1, 2, 3, 4, and 5 of said square were sold at tax-sale on the 14th of October, 1872, and still remains unredeemed: and although the time for redemption will expire on the 14th of October next the said John D. McPherson has taken no steps and made no effort whatever to compel payment of said taxes or redemption of said lots, and in this act has shamefully neglected his duty as trustee; and the said deed of trust, a copy thereof, and of its certificate of acknowledgment and endorsement, is herewith exhibited, marked "A," and prayed to be taken as part of this bill.

19. That the said obligation to the complainant of the said Holden, King, and Ford was received upon the execution by the said John D. McPherson, and still continues to be in his possession.

20. That in consequence of the said acts and omissions of the trustee the defendant, the complainant did, in the latter part of May, 1873, by letter to him addressed and delivered, and to which he has not seen fit to make any reply, request him to resign his trust, and give him to know that if he should not do so she would apply to the court for the appointment of a new trustee, a copy of the body of which letter is herewith exhibited, marked "B," and prayed to be taken as part of this bill.

21. That it is true, as the complainant in that letter stated, that friendly relations do not exist between herself and the said defendant, the chief cause thereof being what she regards as unjust, unrighteous, and exorbitant demands in bad faith made against her by him for the said firm of Carlisle and McPherson, which she refuses to recognize.

22. That in consequence of the premises it is manifestly unfit that the said John D. McPherson should longer continue to hold title to said lands and tenements or be trustee under said deed; and if he does so it will be to the great loss, wrong, and injury of the complainant.

In consideration whereof the complainant prays that the defendant may on his oath make full, true, direct, and perfect answer to the following interrogatories—that is to say:

7 1st. Was not the complainant the owner in fee, on the 26th of November, 1870, of the land and tenements aforesaid?

2d. Did she not then sell the same to the said Holden, King, and Ford at the price and upon the terms above mentioned?

3d. Did she not then give the said vendees possession, and convey to them said square 312?

4th. Did they not then execute to her and deliver to the defendant the bond, or obligation, in paragraph 6 stated; and is not the same still in his possession?

5th. Did not the said vendees then execute and deliver the deed of trust in the 8th paragraph mentioned, in pursuance of the agreement stated in paragraph 7, and is not the same correctly exhibited, and did not he accept said trust?

6th. Have not the said Holden and King ceded their interest in said land to said Ford?

7th. Does not the said Ford continue to owe the complainant a yearly sum of one thousand four hundred dollars interest, which, for

8 the year 1873, will be due on the 26th of November next, and does he not also owe her of the interest for the year 1873 the sum of nine hundred dollars?

8th. Does not the defendant know, and has he not known from the time of the making of said deed, that the said interest was absolutely the whole and only income and means of support of the complainant; and is it not true that she has absolutely no other means of living and of supporting herself and her children?

9th. Did he not, nevertheless, about three months ago, notify the said Ford not to pay the complainant anything more on account of such interest without consulting him?

10th. Has not this caused said Ford to refuse to pay said unpaid sum of nine hundred dollars?

11th. Is not the said Ford his client, and is he not the attorney of the said Ford in litigation about a portion of said property, or as to other matters?

12th. Have not the taxes on said land been permitted to accumulate and remain unpaid, as is above alleged, and have not the said

9 lots 1 to 5, of said square, been sold for part of such taxes, as is

above alleged, and for what sum, and when will the time for redemption expire?

13th. What act of any kind has the defendant done for the interest of the complainant, as such trustee, and what exertions has he made to have the said taxes paid, and the interest due by said Ford paid to her?

14th. Has he proceeded to enforce payment of such interest overdue, in the mode provided by said deed; and if he has not, why has he not done so?

15th. Did not the complainant, some two months since, request him to resign, and notify him by the letter aforesaid, that if he did not she should apply to the court to appoint a new trustee; and is not that letter correctly exhibited?

16th. Is it not true that friendly relations do not exist between him and the complainant?

17th. Is it not true that it is not fit he should *not* continue to be trustee; and are not his interest as lawer and creditor, and his claims as such, inconsistent with the faithful performance for her interest only of his duties as trustee?

10 And that by decree of this honorable court all the estate, right, title, and interest in, of, and to said lands, tenements, and premises, in the said John D. McPherson vested by and under said deed, be devested, and do pass and vest in Dr. John B. Blake, as trustee in his stead; and all the rights, powers, and duties of said defendant as trustee hereunder be decreed to cease and determine instantly upon the giving of said decree; and also that he be decreed to bring into court, to be delivered to her, the said obligation of the said Holden, King, and Ford; and that she have such other relief as the nature of her case may require, and as may be consistent with equity.

May it please the court to grant to the complainant its writ of subpœna, to be directed unto defendant, commanding him to appear by day and under a penalty to be named t'erein, before this honorable court, and then there to answer the premises and abide the order and decree of the court.

PIKE & JOHNSON,
Solicitors for Complainant.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Mary A. Cox, do solemnly swear that the matters stated in the foregoing bill are true in substance and in fact: so help me God.

MARY A. COX.

Sworn and subscribed before me June 11, 1873.

R. J. MEIGS, *Clerk.*

Exhibits A and B of bill.—Filed June 11, 1873. *R. J. Meigs, clerk.*

MARY A. COX
vs.
JOHN D. McPHERSON.

(Copy.)

This indenture, made this twenty-sixth (26) day of November, in the year of our Lord one thousand eight hundred and seventy, (1870,) between Charles H. Holden and Fanny E. Holden, his wife, Charles W. King and Mary J. King, his wife, and Samuel Ford and Ellen H. Ford, his wife, of the first part, and John D. McPherson and Jesse B. Wilson,

of the second part, all of the city of Washington, in the District of Columbia.

11 Whereas the said Charles H. Holden, Charles W. King, and Samuel Ford are indebted to Mary A. Cox, trustee under the will of William Cox, late of Washington City, in the District of Columbia, deceased, in the sum of thirty-eight thousand dollars, ($38,000,) payable on or before the twenty-sixth (26) day of November, in the year of our Lord eighteen hundred and eighty, (1880, (with interest annually, with the right to pay in instalments of not less than three thousand ($3,000) whenever they shall elect:

Now, therefore, this indenture witnesseth:

That the said parties of the first part, for and in consideration of the premises aforesaid, and *further* the sum of one dollar in lawful money of the United States to them in hand paid by the said parties of the second part at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, aliened, enfeoffed, released, and conveyed, and do by these presents grant, bargain, sell, alien, enfeoff, release, and convey unto the said parties of the second part, and the survivor of them, and the heirs of said survivor, all that certain piece or parcel of land situate in the city of Washington, in the District of Columbia, and known and designated in the public plat of said city as square numbered three hundred and twelve, (312,) together with the buildings, improvements, rights, privileges, appurtenances, and other hereditaments to the same belonging or in any wise appertaining, and all the estate, right, title, interest, and claim, either at law or in equity, or otherwise however, of the said parties of the first part, of, in, to, or out of the said piece or parcel of ground and premises.

To have and to hold the said piece or parcel of ground and premises, with the appurtenances unto, and to the use of the said parties of the second part, the survivor of them, and the heirs of said survivor, forever.

12 In and upon the trusts hereinafter mentioned and declared, and for no other purpose whatsoever, that is to say:

In trust. First: To permit the said Charles H. Holden, Charles W. King, and Samuel Ford, their heirs or assigns, to use and occupy the said-described premises, and the rents, issues, and profits thereof to take, have, and apply to and for their sole use and benefit until default be made in the payment of the principal sum of the debt hereinbefore mentioned or of some instalment of the annual interest.

Second. Upon payment of any instalment of the principal of the said debt, to release to the said parties of the first part of said square which they shall designate in the proportion of two square feet of ground for every three dollars so paid.

Third. And upon full payment of the said debt of thirty-eight thousand dollars ($38,000,) and of the interest thereon, and all other proper costs, charges, commissions, and expenses incurred in pursuance of this trust to release the said square numbered three hundred and twelve (312) or so much thereof as has not been released unto the said parties of the first part, their heirs and assigns, at their proper cost.

Fourth. And upon this further trust upon default being made in the payment of the said principal sum, or of any interest due on the same, to sell at public auction, on such terms and after such notice as the said trustees or trustee shall deem proper, so much of the said property as they or he shall deem necessary to pay the sum due, and out of the proceeds in the order following, to pay, 1st: the costs and expenses of said

sale, including the usual trustee's commission; 2d, to pay the amount due the said Mary A. Cox, whether of interest or principal; 3d, to pay the said Mary A. Cox the residue of said proceeds to an amount not exceeding the principal sum or the part thereof unpaid to be
13 received by her in advance, in whole or part satisfaction, as the case may be, of the said principal sum; 4th, to pay over the residue, if any, to the said parties of the first part, their executors, administrators, or assigns.

In testimony whereof the said parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

C. H. HOLDEN. [L. S.]
FANNIE E. HOLDEN. [L. S.]
CHA'S W. KING. [L. S.]
MARY J. KING. [L. S.]
SAMUEL FORD. [L. S.]
ELLEN H. FORD. [L. S.]

Signed, sealed, and delivered in the presence of—
AMOS HUNT.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Amos Hunt, a justice of the peace in and for the county and District aforesaid, do hereby certify that C. H. Holden and Fannie E. Holden, his wife, Charles W. King and Mary J. King, his wife, and Samuel Ford and Ellen H. Ford, his wife, parties to a certain deed bearing date on the twenty-sixth (26) day of November, A. D. 1870, and hereto annexed, personally appeared *me before* in the county aforesaid, the said C. H. Holden, Fannie E. Holden, Charles W. King, Mary J. King, Samuel Ford, and Ellen H. Ford, being personally well-known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed; and the said Fannie E. Holden, Mary J. King, and Ellen H. Ford, being by me examined privily and apart from their husbands, and having the deed aforesaid fully explained to them, acknowledged the same to be their act and deed, and declared that they had willingly signed, sealed, and delivered the same, and that they wished not to retract it.

14 Given under my hand and seal this 7th day of December, A. D. 1870.

[L. S.] AMOS HUNT,
Justice Peace.

(Endorsed:)
37. 1.75.
Deed of trust:
Charles H. Holden and wife, Charles W. King and wife, Samuel Ford and wife to John D. McPherson and Jesse B. Wilson.
2.45.

Received per record October 6, 1871, and recorded in liber No. 663, folio 85, one of the land-records for Washington County, District of Columbia, and examined by Wolf, recorder.

Exhibit B.

It must be apparent to you, Mr McPherson, that under present circumstances I cannot consent to the use of your name any longer as the

trustee representing my interest in the deed from Holden, King, and Ford to you and Jesse B. Wilson.

I need not make any explanation nor attempt to prove to you that between the trustee representing my interest and me there ought to be friendly relations.

You know that such relations do not exist; therefore I must, in self-defence, take steps to defend myself. I shall accordingly apply to the court for the appointment of a new trustee, upon several grounds: your instructing M'r Ford twice not pay me my interest; retaining the bond given by Holden, Ford & Co.; proof of which I can easily produce. You need not be told that I do not seek this course, which will be attended with trouble, without due deliberation and advice; and I write now to give you an opportunity to resign the trust, which I cannot consent that you longer hold.

I return the balance of borrowed money, $140, and should be unmindful of what is due to myself if I did not express my sincere thanks for the loan. You could have had it long ago if you had not interfered with the part payment of my little means. Was it kind?

Respectfully, yours,

MARY A. COX.

15 In the supreme court of the District of Columbia, June 11th, 1873.

MARY A. COX, COMPLAINANT,
against
JOHN D. MCPHERSON, DEFENDANT. } No. 3268. Equity docket 12.

The President of the United States to John D. McPherson, defendant:

You are hereby commanded to appear in this court at its first special term, occurring twenty days after service of this subpœna, and answer the exigency of the bill, under pain of attachment and such other process of contempt as the court shall award.

Witness D. K. Cartter, chief-justice.

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Ass't Clerk.

MEMORANDUM.—That the defendant is to enter his appearance in this suit in the clerk's office on or before the special term to which this writ is returnable; otherwise the bill may be taken for confessed.

Marshal's return.

Summoned June 11th, 1873.

A. SHARP, *Marshal.*

16 *Amendment of bill.—Filed June 27, 1873. R. J. Meigs, clerk.*

In the supreme court of the District of Columbia.

MARY A. COX, COMPLAINANT,
vs.
JOHN D. MCPHERSON, DEFENDANT. } In equity. June, 1873.

The said complainant, by this amendment to her original bill in the above-entitled case, further sets forth and represents as follows:

That after the said defendant had advised her to release without con-

sideration her lien and charge on four of the lots of the said lands held by him and co-trustee in trust as is in the bill alleged, he advised her to release two additional lots of the same, which the said Ford had sold or was about to sell, and on which houses were to be erected, to advise her to make which release he assured her that she should be paid two thousand dollars in money, (which was paid,) and have the notes of the purchasers to the amount of thirteen thousand dollars, secured by a first mortgage on three of the lots released; and upon such assurances she made the release and received the money and notes, the first one of which notes will not be due until the month of January, 1875.

That since the filing and exhibition of her said bill, she has, to her astonishment, learned that at the same time and with the knowledge of the said John D. McPherson, and kept secret from her, three other notes were executed for $1,000 each, all payable a year before any one of those given to her is due, and all secured by the mortgage or deed of trust taken by the said John D. McPherson to himself or to himself and his co-trustee to secure the notes made and delivered to her, and under which she was assured by him that she would have the first mortgage or lien on three of said lots, which are by the same charged with the payment of her notes, and, it now appears, of the other three, of which she knew nothing, whereby her property was made use of to secure other moneys than those payable to herself, without her knowledge, and with the knowledge and consent of the said McPherson.

That one James J. Benedict claims to hold two of said notes thus secured, and from him she first learned, since her bill was filed, of their existence; and it appears from the letter of 16th of June, herewith exhibited, marked "Amendment, Exhibit 2," that he intends, if said notes are not paid at maturity, to demand and compel a sale of the premises whereon they are a charge.

That the said John D. McPherson demands of her unjustly and wrongfully an exorbitant fee for certain services rendered, before he was trustee, by the law firm of which he is a member, and will have the power, if the premises should be sold, of retaining, to her wrong and injury, the said fee; which interests and claim make him unfit to
17 continue to be trustee, as his conduct as trustee, as herein and in the bill set forth, proves him always to have been unfit.

Wherefore she prays that this amendment may be taken and considered as part of her bill, and that he answer the same, and she have such relief as by her said bill is prayed.

MARY A. COX.

By PIKE & JOHNSON,
Her Counsel and Solicitors.

DISTRICT OF COLUMBIA,
City of Washington, ss:

I, Mary A. Cox, do solemnly swear that the matters of fact stated in the foregoing amendment are true in substance and in fact: so help me God.

Exhibit 2 to amended bill.—Filed June 27, 1873. R. J. Meigs, clerk.

WASHINGTON, *June* 16, 1873.

MT's M. E. COX, *Present:*

MADAM: The case of Ford vs. Pike, in which you are interested, so far as a change of trustee is concerned, has been brought to my notice,

and as I represent parties holding two of the notes I address you this to say that I am anxious that you should succeed in having the change made.

The notes I represent are due on the first day of Jan'y next, and should it become necessary to sell the property the present trustee, M'r McPherson, who is also attorney for M'r Ford, will have it in his power to apply the money to his client's claims, and will at the same time have money in his hands to apply to his exorbitant demand against
18 you for services in recovering the Eleventh-street property under the lease to Angus & Lewis.

For these reasons I wish you success, and anything in my power that I can do to aid you I am at your service.

Very respectfully, your obedient servant,

JA'S S. BENEDICT.

Affidavit of R. J. Meigs, j'r.—Filed August 4, 1873. R. J. Meigs, clerk.

In the supreme court of the District of Columbia.

MARY A. COX
vs.
JOHN D. McPHERSON. } No. 3268. Doc. 12.

R. J. Meigs, j'r, being duly sworn, deposes and says:

That he is the assistant clerk of the supreme court of the District of Columbia.

That on the 1st day of July, 1873, the complainant in this cause, M'r's Cox, came to him and requested him to hand the papers in the above-entitled cause to M'r Justice Wylie. This affiant did so, stating to Judge Wylie as he did so that M'r's Cox had requested him to hand the said papers to M'r Justice Wylie.

That he has made examination of the files and cannot find the said papers, and believes they have not been returned to court.

R. J. MEIGS, J'R.
Assistant Clerk.

Subscribed and sworn to before me this 4th day of August, A. D. 1873.

R. J. MEIGS, *Clerk*,
By J. J. CAMP, *Ass't Clerk.*

19 In the supreme court of the District of Columbia, the 4th day of August, 1873.

MARY A. COX
vs.
JOHN D. McPHERSON. } No. 3268. Eq. doc. 12.

Robert W. McPherson, being duly sworn, deposes and says:

That on the 30th day of July, 1873, at the request of the defendant in this cause, John D. McPherson, he entered his appearance for him, and about the same time requested the clerk to furnish him with a copy of the bill and of the amended bill which had been lately filed in this cause.

The clerk, M'r L. P. Williams, informed him that owing to the press of business at that time he could not then prepare the said copies. Not

long afterwards he again requested that copies of the said bills be furnished him, or the originals themselves, but the clerk, M'r R. J. Meigs, j'r. informed him that the said originals had been delivered to M'r Justice Wylie at the personal instance and request of complainant, Mary A. Cox. That he immediately advised the defendant of this fact, and the said defendant (as he informed this affiant) went to the residence of M'r Justice Wylie to obtain the said originals, but he was there informed that M'r Justice Wylie was out of the city, and the said defendant failed to obtain the said originals.

That the said defendant almost immediately thereafter left the city to fulfil professional engagements entered into before the filing of the bill, and has been absent ever since with the exception of a few days, when he returned temporarily.

That since the day he was informed of the withdrawal of the said originals from the files of the court the affiant has repeatedly, and at intervals of but a few days, called at the clerk's office of this court in order to obtain a copy of the said originals, or the originals themselves; but in reply to his repeated inquiries he has always been informed by the clerk in attendance that the said originals had not been returned, and that consequently neither the said originals nor a copy thereof could be furnished him.

That from a cursory examination of the said bills, made before the same were withdrawn from the court by the order of the complainant as aforesaid, this affiant believes that the said original bill contains numerous interrogatories which the complainant prays the said defendant may be compelled to answer on his oath, and that both the said bill and amended bill contain allegations highly injurious to the professional standing and reputation of the defendant, and that he should have a fair and reasonable time allowed him to read the said bills and to answer fully.

ROBERT W. McPHERSON.

Sworn to and subscribed before me this 4th day of August, 1873.

R. J. MEIGS, *Clerk*,
By J. JAY CAMP, *Ass't Clerk*.

Supreme court District of Columbia.

MARY A. COX
vs.
JOHN D. McPHERSON. } In equity. Doc. 12, No. 3268.

The answer of John D. McPherson to the bill of complaint of Mary A. Cox.

This defendant, reserving the causes of demurrer hereinafter set forth and insisted on, for answer to the said bill, says:

1. The allegation that the complainant is a widow woman, citizen of and resident in the District of Columbia, I admit to be true.

2. Also, that I am an attorney and counsellor at law, and of this court, and one of the law firm of Carlisle & McPherson, but I am a citizen of and resident in the State of Maryland, and not of and in the District of Columbia.

3. I have at this time no accurate knowledge of the complainant's title to square 312 in this city, but doubt whether she was seized thereof in fee-simple, as alleged in the third paragraph of the bill. She had, however, a power of sale, and it is not material to correct any errors in her allegations in this respect.

4. It is true that the complainant did on the 26th of November, 1870, sell and convey the said square to Holden, King & Ford, for the sum of $38,000, and upon the terms alleged in the fourth paragraph of the bill.

5. And that she gave them possession thereof.

22 6. And that the vendees executed and delivered to her their bond for the purchase-money, payable ten years after date, with interest payable annually.

7. And that it was agreed at the same time that the said bond should be secured by a deed of trust upon the land; and that the complainant named me as one of the trustees, and the vendees named Jesse B. Wilson for the other trustee.

8. And that, thereupon, the said Holden, Ford & King, and their wives, executed and delivered to the said Jesse B. Wilson and myself the deed of trust set forth in the eighth paragraph of the bill, to secure the payment of the bond aforesaid, and which is in the common form of deeds for such purpose.

9. I do not doubt that the copy exhibited is correct.

10. I accepted the trust.

11. Whether, as alleged in the eleventh paragraph of the bill, the said Holden & King have conveyed their interest in the land to the said Ford, I do not know and do not admit. It is true that portions of the said square have been sold either by Ford alone or by him and his cotenants, (I think by Ford and Holden, and not by Ford alone, as alleged in the bill,) and that they have paid the complainant $2,000 in cash, and that she has released the parts so sold, but it is not true as alleged in the bill that the release was without payment of any instalment of the principal sum except the $2,000, or that it was without any other consideration than the prospective increase of value of the remaining lots; and to the contrary of this the truth is, that whereas by the terms of the bond the complainant was not entitled to receive any part of the principal until the expiration of ten years, she did receive, in the arrangement of which the release was a part, $2,000 in cash and $13,000 in negotiable notes payable at comparatively short dates, secured upon buildings erected upon some of the lots released.

23 It is true, as alleged, that I advised the arrangement and the release, believing it to be for complainant's interest, and knowing from her statements to me that she was greatly in want of money; and I still believe the arrangement was advantageous, not only for the reason already stated, but because, also, the complainant and her children owned an entire square, and some other lots adjoining the one sold by her, and it was her policy to have the latter built upon, and for this purpose to accommodate the builders so far as she could without loss to herself.

It is, however, also true that the complainant made all her bargains herself, thoroughly understanding every proposition in all its bearings.

12. I have no recollection of the sale referred to in the twelfth paragraph of the bill, if it be not the same sale referred in the eleventh paragraph, and as to that I have fully answered.

And here I desire to state that immediately after the bill was filed, and before I had read or could procure a copy of it, it was withdrawn from the clerk's office by the complainant, and not returned until some time in this month of October. I am now too busy to examine the land records, which I would otherwise do and refresh my memory by looking over the deeds relating to the property in question. I can, however, without so doing, answer with perfect confidence as to all my acts in the premises.

13. I do not know what amount of interest is due the complainant from Samuel Ford.

14. I do not know positively whether the interest on the $36,000 balance of the purchase-money is, has been, and must continue to be the complainant's only means of support, as she alleges, but I am quite sure that it is not.

15. And consequently I deny that it was known to me to be, as she alleges, her only means, present and prospective, of support.

24 16. The sixteenth paragraph of the bill charges that I cruelly, maliciously, and without right, have prevented the said Ford from paying to her the interest on the bond. The allegation is, in every essential particular, untrue. The facts are as follows:

In the fall of the year 1868 the complainant applied to M'r Carlisle, my present law partner, to take legal proceedings for the recovery of square 312, which she had leased to Angus & Lewis for ten years, at a rent of $900 a year, they paying taxes, with the privilege of purchase for $15,000. In the lease they had covenanted to erect certain buildings thereon within a certain time. This they had not done; and, as the time had expired for erecting the buildings, she supposed they had forfeited their lease. She said the property had greatly increased in value, and if she should recover it she could sell it for a large advance; and she offered a fee of $5,000, contingent upon the recovery and payable out of the proceeds of the land when sold. M'r Carlisle agreed to undertake the case, provided I thought well of it and would join in it. This account of the interview between her and himself was immediately given me by M'r Carlisle, and I agreed with him to undertake the case. Before seeing him she had told me that she was about to see him upon a subject in which I would be interested, and immediately after the interview with M'r Carlisle she called upon me, told me what her proposition had been, named the fee she had offered, and asked me whether I would with him undertake the case. Thus to us both independently did she distinctly offer the same fee, $5,000.

Upon examining the case, we found that no forfeiture of the lease had been committed, though Angus & Lewis were liable in damages for breach of their covenant to build. We gave certain notices in reference to that default, and after some months Angus & Lewis neglected to pay taxes within the time prescribed by the lease, and this being a

25 forfeiture by the terms of the lease, we brought an action of ejectment, and after long proceedings in law and in equity the land was recovered. She soon sold it, as above stated, for $38,000; and after she had received in cash and notes $15,000, besides $1,250 back rents, I called her attention to our fee as agreed upon, whereupon she flatly denied that she had ever made any such agreement, but said she intended to pay $2,500. I thereupon gave notice to M'r Ford that we had a lien upon the bond, and had possession of it as security for our fee, $5,000, and that he must make no further payment to her on account of it until our lien was satisfied. Learning, however, from the complainant that M'r Ford considered this notice as a reason for not paying the the interest, I told him we did not desire to stop the payment of the interest, but only of the principal to the amount of our fee, and interest thereon. All this occurred prior to the filing of complainant's bill; and if the said Ford neglects or refuses to pay the interest on the bond, it is in no way in consequence of any notice given by me to him.

17. The allegation in the seventeenth paragraph of the bill that it was my duty to see that the interest was paid, and in default of payment to execute the power of sale, and that I have neglected my duty

by not doing so, proceeds upon a misapprehension of the deed of trust. I have no right to act without the order of the creditor, nor without the concurrence of my cotrustee, M'r Wilson. It is not alleged, nor is it true, that the complainant has ever requested me to collect the interest now in arrear, or to enforce the power of sale.

18. The allegation in the eighteenth paragraph of the bill, that taxes have been suffered to accumulate on the property, and that I have taken no steps and made no effort to compel payment of taxes, and have thus shamefully neglected my duty as trustee under the deed of trust, is simply absurd. No such duty is imposed on me by the deed of trust, or in any other way.

26 19. The allegation that the obligation of the said Holden, King & Ford was received by me upon its execution, is true.

20. It is true that the complainant requested me to resign my trust; that I have made no reply to that request, and that the copy of the letter exhibited, marked "B," is a true copy of a letter received by me from her.

21. It is alleged in an amendment to the bill that after I had advised the complainant to release her lien on five of the lots, I advised her to release six additional lots of the same which Ford had sold, or was about to sell, and to induce her to make such release, assured her that she should be paid two thousand dollars in money, and have the notes of the purchasers secured by a first mortgage on three of the lots released, and that thereupon she made the release and received the money and notes, but that with my knowledge, and kept secret from her three other notes were executed of $1,000 each, payable a year earlier than *than* those given to her, and were secured by the same deed of trust upon the said lots and are now held by one Benedict.

In answer, I say that the allegation is utterly untrue in so far as it represents me as holding out inducements or making representations to her. She made her own bargains, and was fully competent to do so. I spent a vast deal of valuable time in hearing propositions and advising her about them, but she determined upon everything herself. And, secondly, I say that the transaction mentioned in the amendment is the same referred to in the body of the bill. There was only one transaction in which she received $2,000 in money. In that affair, Ford and Holden wished M'r's Cox to take certain notes secured on three houses and release two others absolutely. She refused unless $2,000 were paid in cash. Ford and Holden then agreed with Benedict that he would buy three of the notes, and thus enable them to meet M'r's Cox's terms.

27 Accordingly Ford, Holden and Benedict met M'r's Cox at my office. The notes were sold and delivered to him in her presence, and the money instantly passed to her. At the moment of making the transfer a dispute arose, I think about the amount of discount, which was claimed by Benedict, and which Ford and Holden thought excessive. The matter was discussed at most wearisome length, so much so, that I gave notice to the disputants if they did not soon conclude I should close the office. It is incredible that M'r's Cox should not have understood what was passing before her eyes and discussed in her hearing for a full hour or more, and which resulted in the receipt by her of $2,000, which she saw Benedict pay for the notes which she saw him take. That I concealed anything from her, or accepted any trust of which she was ignorant, is utterly untrue. Everything I did was simply to carry into effect bargains made by herself, and this I did to the best of my ability.

22. It is utterly false that, as alleged in the amendment, I demanded any exorbitant fee for services rendered by the law-firm of which I am

a member. The only fee I have demanded is the sum of $5,000, which she offered both to M'r Carlisle and myself separately for the recovery of square 312. She owes fees in two other cases; one for the suit for mesne profits and another for an injunction suit to prevent her property from being subjected to a paving-tax, but I have yet made no demand for them, or for consultations, or drawing deeds; nor have I for those services stated any amount.

And here I deem it proper to return to the bill and reply to an allegation in the 15th paragraph, in which it is stated that M'r Carlisle and I "professed and seemed to be her friends." This, coupled with the charge of demanding exorbitant fees, means nothing less than that our professions were false and for a sinister purpose. Now, I doubt whether either of us ever made any professions on the subject; but, for myself, though my relations with M'r's Cox were exclusively professional,
28 I felt, if I did not profess, a very warm interest in her business. She was left a widow many years ago, and intrusted by her husband's will with full power over a property which, though not large, would have afforded the means of gaiety and enjoyment for a season. Yet, resisting every such temptation, she devoted herself to the management and preservation of her property, which she foresaw would one day attain a value that would afford a competence for her children. In this she exhibited a wonderful self-denial and steadfastness of purpose, and as a widow bent on discharging a trust committed to her by her husband, as a mother striving to provide for her children, and a woman struggling with the hard business of the world, I felt for her a sympathy and regard which had not then been chilled by the exhibition since made of her faithlessness, her untruthfulness, and her ingratitude for our kindness. For five years she was accustomed to call every few days at my office and sit an hour or more at a time; her visits to M'r Carlisle were also frequent. I speak within bounds when I say she occupied as much of my time as I ever gave to any other ten clients, and this at a period of my practice when every hour of my time was so much money. I always received her with more than civility. She consulted me on every imaginable subject connected with her business, and the hopes, fears, plans, and expectations growing out of the suits we were conducting, and her troubles in various other matters. I heard all she desired to say, and gave her the results of my best judgment, whatever the subject might be. Moreover, while her suit was in progress, I lent her upwards of $1,800 in money. On $1,100 I charged no interest; on the residue I charged interest, because it was understood to be advanced on account of the stoppage of the rent of the square, and when that rent was recovered, with interest, I received back my advances, with interest. M'r
29 Carlisle also lent her considerable sums, not yet repaid. The fruits then of our friendship to her were $23,000 profit on square 312, and $2,700 back rents and mesne profits. While from her, all we ever had for the work of five years was a fee of $125, which would not equal the interest on the money we lent her, and for which we charged no interest. That fee, by the way, was only the usual commission of ten per cent., which I innocently retained, without thinking she would object, out of the back rents recovered by suit, and paid to me. But she was so much offended that for weeks she refused to speak to me, and, though she afterward voluntarily apologised and renewed friendly relations with me, she took care to collect herself the money in the next suit for mesne profits, $1,500, and never paid or offered to pay us a cent for our services in the case.

And now, having answered the general allegations of the bill, I proceed to reply to the special interrogatories:

1. The first interrogatory asks: "Was not the complainant the owner in fee, on the 26th of November, of the land and tenements aforesaid,' to wit, square 312?

I answer: I do not think she was.

2. The second int. asks: "Did she not cede the same to the said Holden, King and Ford at the price and upon the terms above mentioned?"

I answer: She did, as well as I recollect, under a power of sale, given in her husband's will.

3. The third int. asks: "Did she not give the said vendees possession, and convey to them said square 312?"

I answer: I believe she did.

4. The fourth int. asks: "Did they not there execute to her, and deliver to the defendant, the bond and obligation in paragraph six stated, and is not the same still in his possession?"

These questions I answer in the affirmative.

5. The fifth int. asks: "Did not the said vendees then execute and deliver the deed of trust in the eighth paragraph mentioned, in pursuance of the agreement stated in paragraph seven, and is not the same correctly exhibited, and did he not accept said trust?"

These questions I answer in the affirmative.

6. The sixth int. asks: "Have not the said Holden and King ceded their interests to the said Ford?"

I answer: I am informed have so done, but I have no certain knowledge thereof.

7. The seventh int. asks: "Did not the said Ford owe the complainant a yearly sum of one thousand four hundred dollars interest, which, for the year 1873, will be due on the 26th of November next, and does he not owe her for the interest for one year, 1872, the sum of nine hundred dollars?"

To this I answer: That I believe Ford, Holden and King jointly owe yearly interest to the amount of $1,380; what amount is in arrear I do not know.

8. The eighth int. asks: "Does not the defendant know, and has he not known from the time of the making of said deed, that the said interest was absolutely the whole and only income and means of support of the complainant, and is it not true that she has absolutely no other means of living and supporting herself and her children?"

To this I answer: I do not know the fact asserted to be true; I believe it is not true; I think the complainant and her children own the entire square, 311, adjoining the one sold, besides other property in that vicinity, all of which is very valuable, and yields some income.

9. The ninth int. asks: "Did he not, nevertheless, about three months ago, notify the said Ford not to pay the complainant anything more on account of said interest?"

To this I answer: I did give a general notice to Ford not to pay anything on the bond until our lien was provided for, but afterwards, and before this bill was filed, withdrew the notice as to the interest.

10. The tenth int. asks: "Has he not caused said Ford to refuse to pay said unpaid sum of nine hundred dollars?"

To this question I answer: No; if Ford does not pay, his neglect is not in consequence of my notice to him, but manifestly in consequence of those embarrassments which have caused him to leave, as this complainant says, the taxes also unpaid.

11. The eleventh int. asks: "Is not the said Ford his client, and is he not the attorney of said Ford, in litigation about a portion of said property, or as to other matters?"

I answer: Ford at this time is my client, but he has very recently become so, and M'r's Cox's interest is in no way concerned in his business with me, and cannot be affected by it.

12. The twelfth int. asks: "Have not the taxes on said land been permitted to accumulate and remain unpaid, as is above alleged, and have not the said lots, one to five of said square, been sold for a part of said taxes, as is above alleged, and for what sum, and when will the time for redemption expire?"

To this I answer: I am informed and believe some taxes are unpaid, but know nothing more than the general fact. I know nothing of any sale nor when the time of redemption will expire. It is not my duty to know anything about it.

13. The thirteenth int. asks: "What act of any kind has the defendant done for the complainant as trustee; and what exertion has he made to have the said taxes paid, and the interest by the said Ford paid her?"

To this I say: As trustee I have, with M'r Wilson, executed releases at M'r's Cox's request. Moreover she has continued, since the sale was made, to consult me and use my services in the various phases of her business with Holden, Ford and King. I presume she thought herself justified in calling upon me, as trustee, for such advice and aid. As to the interest, when the first year's interest fell due it was not paid.
32 M'r's Cox applied to me and I wrote to the obligees on the bond, and saw them personally and induced them to pay her. I do not remember to have done anything about taxes.

14. The fourteenth int. asks: "Has he proceeded to compel payment of said interest overdue in the mode provided by said deed; and if he has not, why has he not done so?"

To this I answer: I have not done so because I have not been requested to do so. It is not my duty, and it would be illegal so to act without the request of M'r's Cox, the creditor, and the concurrence of my cotrustee.

15. The fifteenth int. asks: "Did not the complainant some two weeks since request him to resign, and notify him by the letter aforesaid that if he did not she would apply to the court to appoint a new trustee; and is not the letter correctly exhibited?"

To this I answer: Yes; but as I was appointed trustee not by the complainant, but by the deed of Holden, King & Ford, I do not see that it would be proper for me, if I could, to relinquish the trust without their concurrence; and besides, I could not do so without a decree of the court, obtained upon a proper bill filed, and to which they are parties. Besides, I accepted the trust and have had some trouble, and if any commissions are to be had therefrom, I desire to earn and receive them.

16. The sixteenth int. asks: "Is it not true that friendly relations do not exist between him and the complainant?"

To this I reply: If when friendly relations have existed between two persons it is competent for one, without the act of the other, to put an end to them by abusing that other, then the complainant has put an end to the friendly relations between us, but no act of mine has given occasion for her to do so.

17. The seventeenth int. asks: "Is it not true that it is not fit he should continue to be trustee, and are not his interests as a lawyer and creditor, and his claims as such, inconsistent with the
33 faithful performance, for her interests only, of his duties as trustee?"

To this I answer: It is perfectly fit that I should continue to be trustee; my interests as lawyer and creditor, and my claims as such, are in no degree inconsistent with the faithful performance of my duty as trustee. Every lawyer is the creditor of his client to some extent, and has a lien for his fees on the product of the suit. The complainant admits she owes us something for our services. That debt existed when she requested me to be trustee. The relation of "lawyer and creditor" existed then, and was deemed by her no disqualification; it is no more such now. I have thus far performed my duty as trustee, and am perfectly willing to continue to perform it.

And this defendant, pursuant to the reservation heretofore made in his answer, demurs to the bill for want of proper parties, and says that inasmuch as the trust from which the complainant seeks to remove him was created, and the estate in land of which she desires to divest him, was conveyed to him by the deed of Charles H. Holden, Samuel Ford, and Charles W. King, and their wives, and this fact appears by and is set forth in the bill of complaint, no decree can be rendered by this court affecting the execution or the trust created by the said deed, unless the said grantors are first made parties to this proceeding; whereupon the defendant prays the judgment of this court, &c., &c., and that he be hence dismissed with his reasonable cost, &c., &c.

JNO. D. McPHERSON.

DISTRICT OF COLUMBIA, *set.:*

John D. McPherson, being duly sworn, deposes and says that he has read the foregoing answers, and knows the contents thereof; that the matters and things therein stated of his own knowledge are true, and those stated upon the information of others he believes to be true.

R. J. MEIGS,
Clerk.

34 *Supplemental bill.—Filed March* 3, 1874. *R. J. Meigs.*

In the supreme court of the District of Columbia, the day of February, 1874. In equity.

MARY A. COX, PLAINTIFF,
vs.
JOHN D. McPHERSON, DEFENDANT. } No. 3268. Eq. doc. 12.

The plaintiff, Mary A. Cox, by this her supplemental bill in the above-entitled cause, by leave of the court exhibited, further sets forth and represents—

1. That since the exhibiting of her said bill and of her amendment thereto, to wit, since the 15th day of February, 1874, she has been notified by the said James T. Benedict, in behalf of Harmon C. Westervelt and his wife, Lousia Westervelt, holders of two of the said three notes in her said amendment mentioned, for one thousand dollars each, secured without her knowledge by deeds of trust executed by James T. Pike and Augusta M. Pike, as in said amendment and hereinafter mentioned, that unless she would pay them the sum of two hundred dollars, on account of interest due on the notes so held by them, they should at once notify the defendant, John D. McPherson, as trustee, to make sale of the houses and lots held in trust by him and the said Wilson, to secure the said notes, a note for one thousand dollars held by John E.

Kendall, and those held by the plaintiff, amounting to thirteen thousand dollars; and she, refusing to advance and pay that sum, the said Westervelt and his wife have notified the said John D. McPherson to sell, but have given some instruction to him to delay doing until further notice, and have offered to delay the sale for one week.

35 2. That the said Charles H. Holden and Samuel Ford, early in January, 1872, sold to James T. Pike three lots, numbered 26, 27, and 28, in square 312, part of the property in said bill mentioned, sold by the plaintiff to the said Holden & Ford and Charles W. King, and part of the lots which she, about that time, released, as stated in the said amendment. And on the 1st, 2d, and 3d days of January, 1872, the said James T. Pike and Augusta M. Pike, his wife, conveyed by three deeds on those days respectively made, to the said John D. McPherson and Jesse B. Wilson, the said three lots, to wit, lot 28 on the 2d day of January, lot 27 on the 3d day of January, and lot 26 on the 1st day of January, each to secure an indebtedness of James T. Pike, for the purchase-money and price of the lot conveyed to the said Holden & Ford, of $5,333.33, evidenced by five notes, payable, respectively, in two, three, four, five and six years from their date; and the three of such notes, payable in two years, being $1,000 each, and two of them, but which two the plaintiff does not know, being those held by the said Westervelt and his wife, and said to belong to her; and the other being held, at this time, by one John E. Kendall.

3. That on the 11th day of December, 1873, the said John D. McPherson applied for and received from the office of the record of deeds of the District of Columbia the said three deeds of trust, which had then been duly recorded, and now has possession of the same.

4. That the said John D. McPherson claims, by his answer to the said original bill and amendment, to have a lien on the bond in her bill mentioned, for ($38,000,) of the said Holden, Ford, and King, to secure the fee which he pretends she owes to himself and his partner, James M. Carlisle, and has taken the testimony of his said partner to prove that she, the said plaintiff, did offer and agree to pay the sum of five thousand dollars for the services in his answer set forth; that the

36 said Carlisle is no party to this suit, nor is there any issue herein in regard to their claim and pretended fee; nor has the said McPherson herein sued or impleaded her for the same, or given her opportunity to answer in regard thereto; nor has he asked that said lien may be decreed to exist, or any relief in regard thereto; and she, however, reiterates her allegation that he and his partner do claim of her an exorbitant fee, as his answer shows to be true; and she avers that it is not true that she ever offered, or promised, or expected to pay any such fee, or any larger fee than twenty-five hundred dollars; and that the fee so claimed is not exorbitant but iniquitous, and a shameful charge against her; and that even what she offered was five times too large a compensation for the services rendered, and if the court is asked to decree a lien for even the sum of twenty-five hundred dollars, she will pray to be protected by it against so exorbitant a charge.

5. That it is the purpose of the said John D. McPherson, if he make sale as trustee of any of said property, to receive the purchase-money and apply the sum of five thousand dollars thereof to the satisfaction of the exorbitant and iniquitous fee, charge, and claim without giving her, by suit or proceeding therefor at law or in equity, an opportunity to deny and resist his demand, and to put him and his partner to proof thereof; and if he is not prevented by the interposition of this court, and should make such sale and receive money thereon, he will abuse the

opportunity afforded him by his position as trustee to appropriate to the use of himself and his partner the amount, or as much thereof as he may receive, of the said fee which he claims is due to them by her.

6. That he has in his possession the said bond for $38,000, made by the said Holden, King and Ford, to her or to him and his cotrustee, (whether to her or them she does not know,) and claims to have a lien on it with his said partner for said fee of $5,000 that she does
37 not owe them, and never agreed or promised or offered to pay them, which they can only prove by their own oaths; for which they have no right of action in this court, nor any lien thereof that they can enforce here, upon any moneys that the said trustees may receive upon sale of any of said property.

7. That by each of the said three deeds of conveyance in trust, so aforesaid executed by the said James T. Pike and wife to the said John D. McPherson and Jesse B. Wilson, the said James T. Pike covenanted with the said trustees that all taxes on the lot of land thereby conveyed should be paid, and the building thereon kept insured during the continuance of the trust, in some good and responsible fire-insurance company or companies to the satisfaction of the said trustees; but the said covenants have not been kept, the taxes have not been paid, and after the exhibiting of the said bill the plaintiff found that the buildings on said three lots had not been and were not insured; and the said John D. McPherson declaring that it was not his business to see that the said buildings were kept insured, and the said James T. Pike alleging to the plaintiff that he had placed in the hands of the said John D. McPherson one hundred and fifty dollars with which to keep said houses insured, she has been compelled, during the last six months, herself to insure and keep insured the same, with an insurance company in the city of Washington.

8. And she herewith exhibits a certified copy of one of the said three deeds, containing the said covenants, and the same being marked "Exhibit A of supplemental bill," she prays that it may be taken and considered as part hereof.

Wherefore the plaintiff prays that the said John D. McPherson may answer the following interrogatories, that is to say:

38 1. Has he or not received notice to make sale of the said three lots of ground and the buildings thereon, or two of them, from the said Harman C. Westerveet and his wife, or one of them, from some person for and on behalf of them, or one of them, under said deeds, or some of them, from the said James T. Pike and wife?

2. Were said three deeds of trust to himself and the said Wilson executed as is in the second paragraph hereof alleged, and to secure the notes therein mentioned; and has he not received them as alleged, and are they not now in his possession?

3. Who held said three notes first due for one thousand dollars each?

4. Is it not his purpose and intention, out of the proceeds of sale of said lots, to pay himself and the said Carlisle, in money or in notes given by the purchaser or purchasers, the said fee of five thousand dollars?

5. Does not each of said deeds contain the covenant in regard to taxes and insurance above recited?

6. Has he ever taken any steps to compel payment of such taxes, or seen to their payment, or troubled or interested himself in regard thereto in any way?

7. Has he made any effort, or taken any trouble, or interested him-

self in any way to see to it that said buildings should be kept insured, or known or cared whether they were insured or not?

8. Did the said James T. Pike place in his hands the sum of one hundred and fifty dollars, or any other sum, with which to have the said buildings insured?

And the plaintiff prays as in her said original bill and amendment she hath prayed, and that the said John D. McPherson may be decreed to pay into court here and surrender to her the said bond of Holden, King and Ford for $38,000; and that a writ of injunction be granted, upon the filing of this supplemental bill, with subpœna to appear and answer hereunto; and that by such writ of injunction the
39 said John D. McPherson may be prohibited, enjoined and forbidden to receive, in case he and the said Wilson shall make sale of any or either of said lots, any moneys or notes that are to operate as satisfaction in whole or in part of any of the notes of said James T. Pike to Holden & Ford, which are held by her, being all except the three first due; and that all such money and notes be paid and delivered by the purchaser directly to her, or into court here, as the court may order and decree, and then be applied in payment of said notes without delay.

And as in duty bound she will ever pray.

PIKE & JOHNSTON,
Solicitors for Mary A. Cox.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I do solemnly swear that I have heard read the supplemental bill above by me subscribed, and know the contents thereof; and that the facts therein stated upon my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true. So help me God.

MARY A. COX.

Sworn and subscribed to before me this 21st day of February, 1874.
[SEAL.] ROBERT V. HUGHES, *J. P.*

40 *Exhibit A of supplemental bill.—Trust.*

Liber 670, folio 69. Stamp, $5.50.

JAMES T. PIKE
to
MCPHERSON AND WILSON.

Recorded January 12, 1872, 10.30 a. m.

This indenture, made this third (3) day of January, in the year of our Lord one thousand eight hundred and seventy-two, (1872,) between James T. Pike and Augusta M. Pike, his wife, of the first part, and John D. McPherson and Jesse B. Wilson, of the second part:

Whereas the said James T. Pike is indebted unto Charles H. Holden and Samuel Ford in the sum of five thousand three hundred and thirty-three dollars and thirty-three cents, ($5,333.33,) for which sum he hath given his five (5) promissory notes, bearing even date with these presents, and payable with interest annually, to the order of said Holden & Ford, as follows, that is to say, four (4) notes for the sum of one thousand dollars each, ($1,000,) and one (1) note for the sum of thirteen hundred and thirty-three dollars and thirty-three cents, ($1,333.33,) in two, (2,) three, (3,) four, (4,) five, (5,) and six (6) years, respectively,

from the date hereof, and being desirous to secure the punctual payment of said notes when and as the same shall respectively become due and payable, with all interest and costs due and accruing thereon, do therefore execute these presents:

Now, therefore, this indenture witnesseth that said parties of the first part, for and in consideration of the premises, and of the sum of one dollar in lawful money of the United States to them in hand paid by the said parties of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowl-
41 edged, have granted, bargained, sold, aliened, enfeoffed, released, and conveyed, and do by these presents grant, bargain, sell, alien, enfeoff, release, and convey, unto the parties of the second part, their heirs and assigns, the following-described real estate, situate in the city of Washington, District of Columbia, to wit, all that piece or parcel of ground and premises, with the appurtenances, lying and being in the city of Washington aforesaid, and known and described on the plat and ground-plan of said city as lot numbered twenty-seven, (27,) in Holden & Ford's recorded subdivision of square numbered three hundred and twelve, (312,) as recorded in subdivision book C. H. B., in the surveyor's office.

Together with all the improvements, ways, easements, rights, privileges, appurtenances, and hereditaments to the same belonging or in any wise appertaining, and all the estate, right, title, interest, and claim whatsoever, either at law or in equity, of the said parties of the first part of, in, and to the said piece or parcel of land and premises.

To have and to hold the said piece or parcel of land and premises, with the appurtenances, unto and to the use of the said parties of the second part, their heirs and assigns. In and upon the trusts, nevertheless, hereinafter mentioned, and none other, that is to say, in trust to permit the said parties of the first part, their heirs or assigns, to use and occupy the said described premises, and the rents, issues, and profits thereof to take, have, and apply to and for their and their sole use and benefit until default be made in the payment of said notes, or either of them, or any instalment of interest due thereon, or any proper cost, charge, commission, half-commission, or expense in and about the same.

And upon the full payment of all of said notes and the interest thereon, and all other proper costs, charges, commissions, half-commissions, and expenses at any time before the sale hereinafter pro-
42 vided for, to release and reconvey the said described premises unto the said James T. Pike, his heirs or assigns, at his or their cost. And upon this further trust, that upon default being made in the payment of the said notes, or either of them, or any instalment of interest due thereon, or any proper cost, charge, commission, half-commission, or expense in and about the same, then, and at any time thereafter, to sell the said piece or parcel of land and premises at public auction, in front of the premises, after at least ten days' notice of the time, place, and terms of sale, by advertisement in some one or more of the newspapers printed and published in the said city of Washington, which said terms of sale shall be as follows, viz, the amount of indebtedness secured by this deed of trust unpaid, with the expense of sale, in cash, and the balance at six, (6) twelve, (12,) and eighteen (18) months, for which the notes of the purchaser bearing interest from the day of sale, and secured by a deed of trust on the property sold, shall be taken; a deposit of one hundred dollars ($100) shall be required of the purchaser at the time of sale, and all conveyancing and revenue-stamps shall be at the expense of the purchaser.

And upon this further trust, upon full compliance with the terms of sale to convey the property sold in fee-simple to the purchaser or purchasers thereof, at his, her, or their cost and expense, and without any liability to see to the application of the purchase-money, and out of the proceeds of said sale or sales, first, to pay all proper costs, charges, and expenses, and to retain as compensation a commission of five (5) per cent. on the amount of said sale or sales; secondly, to pay whatever may then remain unpaid of the said notes and the interest thereon, whether the same shall be due or not; and, lastly, to pay the remainder, if any, to said James T. Pike, his executors, administrators, or assigns.

And the said James T. Pike does hereby covenant with the said parties of the second part, their heirs and assigns, that all taxes
43 upon the said land shall be duly paid, and that the building on said parcel of land shall be kept insured during the continuance of this trust in some good and responsible fire-insurance company or companies, to the satisfaction of the parties of the second part, in the sum of thirty-five hundred dollars, ($3,500,) for the benefit of the debt hereinbefore described, and the policy or policies of insurance be assigned to the said parties of the second part as trustees under these presents.

And further, that in case the said James T. Pike, his heirs or assigns, shall fail to pay taxes or to keep said property so insured, then the taxes may be paid and the property be insured for the amount aforesaid by the legal holder of the note before mentioned; and the amount of taxes and premium paid shall be considered a part of the expenses of said note secured hereby, in default of payment of which on demand the said parties of the second part shall have power to sell said property hereby conveyed as aforesaid, and shall dispose of the proceeds of sale as hereinbefore provided.

And it is further agreed that if the property shall be advertised for sale under the provisions of the deed, and not sold, then the said trustee shall be entitled to one-half the commission above provided, to be computed on the amount of the debt hereby secured.

In testimony whereof the said parties of the first part have hereunto set their hands and seals on the day and years first hereinbefore written.

JAMES T. PIKE. [L. S.]

Signed, sealed, and delivered in the presence of, having first been duly stamped,

FRED. KOONES.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Frederick Koones, a notary public in and for the county
44 aforesaid, do hereby certify that James T. Pike and Augusta M. Pike, his wife, parties to a certain deed bearing date on the third day of January, A. D. 1872, and hereto annexed, personally appeared before me in the county aforesaid the said James T. Pike and Augusta M. Pike, his wife, being personally known to me to be the person who executed the said deed, and acknowledged the same to be their act and deed; and the said Augusta M. Pike being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and notarial seal this fourth (4) day of January, A. D. 1872.

FRED'K KOONES,
Notary Public.

(Endorsement:) This is to certify that the within is a true and verified copy of deed from liber No. 670, folio 69, one of the land records for the District of Columbia.—S. Wolf, recorder. July 28, 1873. Filed March 3, 1874.—R. J. Meigs.

45 In the supreme court of the District of Columbia, the day of April, 1874.

MARY A. COX
vs.
JNO. D. MCPHERSON. } No. 3268. Eq. Doc. 12.

Answer of John D. McPherson to supplemental bill.

To the honorable the justice of the supreme court of the District of Columbia, holding a special term thereof for equity matters:

This defendant, saving and reserving to himself now and at all time hereafter all and all manner of benefit and advantage of exception to the manifold uncertainties and imperfection in the complainant's supplemental bill contained, and more especially saving and reserving to himself the benefit of the demurrer and causes of demurrer hereinafter contained and set forth, not in anywise waiving the same, or the demurrer in his answer contained to the original and amended bill of complaint in this cause filed, by now making answer to the so-called supplemental bill, but craving the same advantage of the said several demurrers and causes of demurrer that could enure to this defendant by a special demurrer to said supplemental bill, for answer to said supplemental bill, or to so much thereof as materially concerns this defendant to make answer to, he, first making known to the court that he has answered the original and amended bill of complaint very fully, that issue upon said answer was joined, and testimony by both parties taken before an examiner of the court, and the case there closed, and that thereupon the cause was set for final hearing at the instance of this defendant before the complainant made application to the court for leave to file the supplemental bill, now answers and says:

1. He has received from Harmon C. Westervelt, for Mrs. H. C.
46 Westervelt, a notice addressed to himself and one Jesse B. Wilson, to proceed under two (2) of the deeds of trust mentioned in the supplemental bill, dated January 2 and January 3, 1872, to make sale of the lots therein described. The first notes secured by said deeds were exhibited to him by the said Harmon C. Westervelt, and are now in the possession of said Westervelt, as this defendant is informed and believes.

He exhibits herewith a copy of the said notice, marked "Exhibit J. D. M., No. 1."

And he further says that the holders of the said notes first falling due are satisfied with the trustees in the premises, as appears by the letter of Harmon C. Westervelt, a copy of which is exhibited herewith, marked "Exhibit J. D. M., No. 2."

2. He admits the matters and things in the second paragraph of the bill contained, but says that in the said deeds of trust executed by the said Pike there is a provision that, upon a sale being made, the whole amount of indebtedness secured by the deeds of trust unpaid and the expenses of sale shall be required in cash, and this is made one of the terms upon which the sale shall be made, and by said deeds the trustees are empowered to pay out of the proceeds of sale whatever may then remain unpaid of all the notes secured by said deeds and the interest

thereupon, whether the same shall be due or not, as will more fully appear by said deeds of trust, reference thereunto being had, on consideration of which fact the court will see that the said so-called supplemental bill does not well consist with the amended bill filed in the premises.

3. This defendant says that not he but his counsel obtained from the office of the recorder of deeds the three deeds of trust mentioned; that they were obtained for the purpose of being filed in evidence in this cause, in order that the court might see how the complainant was at fault in charging this defendant in keeping secret from her the fact that there were three notes of one thousand dollars each
47 secured by the said deeds, falling due in two years after date. She knew that none of her notes fell due before three years from date. She knew, as the testimony in her behalf taken in this cause shows, that fifteen notes, amounting in the aggregate to sixteen thousand dollars, were secured by said deeds of trust, and the said deeds of trust were filed to show that no harm was done to her, but a benefit rather, as subsequent circumstances in the so-called supplemental bill set forth fully show, by force whereof the notes held by her now become due, and had the three notes due in two years been paid at maturity her security would have been increased proportionally in value. And this defendant filed the said deeds of trust in evidence for the said purpose before the application for leave to file a supplemental bill was made by complainant, and they are not now and have not since been in his possession, which was well known to complainant's solicitors.

4. As to the matters and things in the 4th paragraph of the bill contained, this defendant says that the said complainant, Mary A. Cox, did offer to James M. Carlisle and himself, of her own free will, a fee of five thousand dollars, if he and said Carlisle would act as her counsel, and undertake certain litigation necessary to enforce the forfeiture of a certain agreement by her made with Angus & Lewis in these proceedings mentioned, and by force whereof she was bound to sell them square 312, in Washington city, for fifteen thousand dollars; also to recover the possession of said square; she knowing that the property had greatly risen in value since the making of said agreement with Angus & Lewis, and being willing to pay the fee above-mentioned in the event of the success of such litigation, and promising to pay it out of the proceeds of the sale of property to be recovered, which she intended to sell at at an advanced price, and to pay nothing to said Carlisle and himself in the event of their failing to recover said property. In consider-
48 ation of which agreement this defendant, in conjunction with said Carlisle, did give counsel and advice to the complainant, and undertook said litigation and recovered the said property, and the defendant sold the same for $38,000 to Holden, King, and Ford, who gave the bond in these proceedings mentioned for the sum of $38,000.

The said complainant never, in her bill or amended bill, referred to the amount of the fee, to wit, $2,500, which she in her supplemental bill alleges that she agreed to pay the said Carlisle and himself.

He calls the attention of the court to the fact that the allegation in the supplemental bill that she offered $2,500 was made after the taking of the testimony of said Carlisle and the exhibiting by him, the said Carlisle, of letters of complainant written by herself, in one of which she states that the fee was to be paid out of the proceeds of the sale of said property, (square 312,) as such proceeds should be realized, and in another of which she says that she offered to pay $2,500, and that she will honestly pay that sum.

This defendant here shows the court that the same objections set

forth in the said 4th paragraph were made to the introduction of the testimony of said Carlisle, and that the complainant never made herself a witness to rebut them, and this defendant submits that the allegation in said 4th paragraph, which she herself even says are reiterations of the allegations in the bill and amended bill contained, are not supplemental matter, and that the same and the whole of said 4th paragraph are and is impertinent, and should be disregarded by the court; that the introduction of her statements under oath in her so-called supplemental bill is a novel way of rebutting testimony already taken, and ought not to be tolerated by this honorable court.

This defendant further submits that, although the same be impertinent, the matters therein referred to disclose the scheme of this
49 whole suit, which is not to remove a trustee who in her belief has acted mala fide, but to enable her to defeat the just claim of her attorneys to the compensation to which they are entitled for services faithfully discharged. She asks the court to help her to do this by requiring this defendant to surrender the bond which represents the proceeds of the sale of said square 312, out of which the fee due to this defendant and his partner, the said James M. Carlisle, according to her own statement in writing, is to be paid, without first offering to do equity by paying into court or tendering to this defendant even the sum of $2,500 which she says she will honestly pay, not to speak of the $5,000 which is shown by the evidence to be due and unpaid. And in this connection this defendant says that she has never tendered the said $2,500 alleged by her to be due, or any part, although she has received on account of the sale of said property $15,000 in cash and notes.

This defendant, further answering, says that the sum of $5,000 is due to him and the said Carlisle, and payable to them out of the proceeds of the sale of said property for services rendered in recovering the same. That this defendant and the said Carlisle claim a lien on the said bond; that he holds the said bond, not as trustee, but as attorney and solicitor, to protect the lien for the fee of $5,000 due to himself and partner.

That the complainant knew and stated to this defendant that he had a right to the papers, and recognized this right when she left with him the said bond, and she gave the same to him owing to the claim of this right to the same to protect the fee due to himself and the said Carlisle for the sum of $5,000.

This defendant appeals to the court to protect his said lien in the premises by refusing to make the decree asked for by complainant touching said bond.

5. This defendant denies that it is his purpose to apply the pro-
50 ceeds of the sale of the property in the three deeds of trust mentioned in any other manner than that prescribed by the deeds of trust. His co-trustee, Jesse B. Wilson, and himself would, in the event of a sale under said deeds of trust, jointly receive the purchase-money of any sale or sales so made by them as such trustees. This defendant, for himself, is perfectly willing to pay such proceeds of sale into court, or to deposit it, as the court may direct. This defendant did not know whether or not the complainant held all the last four notes at the present time until the filing of the supplemental bill. He (if the court should so direct) will willingly bring into court, as prayed by her, the proceeds of any sale or sales to be made by him, which may be applicable to the payment of the notes held by her, his co-trustee assenting.

6. This defendant says he has already answered the matters and things in the 6th paragraph contained.

7. This defendant, in answering the matters in the 7th paragraph of

the supplemental bill contained, refers to the deeds of trust to show what duties are imposed upon him and Jesse B. Wilson in the premises. If the complainant did furnish money to keep the houses by the deeds of trust conveyed insured, she never furnished nor offered to furnish it to this defendant, nor ever applied to him to know whether the insurance by her made was satisfactory. But for any money so furnished by her the deeds of trust give her a lien upon the property itself, with a right to require the sale thereof if the same be not promptly repaid.

Touching the allegation that James T. Pike had told the complainant that he had placed in the hands of this defendant the sum of one hundred and fifty dollars with which to keep the property insured, this defendant says the allegation is faulty for want of an averment by complainant that she believed said Pike when he made the statement, if he ever did make it; but, notwithstanding the want of such an averment, this defendant answers and positively denies that the said Pike ever placed in his hands any sum whatever for any such purpose.

51 The defendant now answers the interrogatories in the said so-called supplemental bill contained.

To the first interrogatory he saith:

1. He has received notice from Harmon C. Westerwelt for Mrs. Harmon C. Westerwelt, as hereinbefore alleged, and refers to his preceding answer for answer to this interrogatory.

To the second interrogatory he saith:

2. He has not the three deeds of trust in his possession; they are with the court papers in this cause, filed therein, with knowledge of complainant's counsel, before the filing of the said supplemental bill, and they explain themselves.

To the third interrogatory he saith:

3. He believes that Harmon C. Westerwelt's wife is the owner of and holds two of the notes, and John E. Kendall the other.

To the fourth interrogatory he saith:

4. He has not, and has not at any time, had any such intention or purpose as in this interrogatory inquired of. His co-trustee, Jesse B. Wilson, is entitled to the money referred to equally with himself. Such a purpose would be futile without said Wilson's concurrence.

To the fifth interrogatory he saith:

5. The deeds of trust are filed in the case and show for themselves.

To the sixth interrogatory he saith:

6. The deeds of trust impose on the trustees no such duty as that of paying taxes. He and his said co trustee have a dry legal estate in the premises. He, therefore, has taken no steps to compel payment of taxes.

To the seventh interrogatory he saith:

7. He remembers nothing in regard to the insurance, except as hereinafter stated in this answer, namely: At the time of the execution of the deeds of trust the property was already insured, and the policies had some nine or ten months to run, and it being suggested by

52 the complainant to this defendant that it would be well to inquire into the standing of the companies which had issued the policies, she undertook to do so herself, and to the best of this defendant's recollection and belief the policies were placed in her hands on that occasion What was the result of the inquiries this defendant does not remember with any clearness, but knows that it did not result in his being called on to effect any insurance, nor does he remember that he was ever called on to do anything in the premises. He has never been furnished with money to keep the premises insured, and it was not his duty to in-

sure them. He does not know whether his co-trustee was ever furnished with money or not for the purpose. If Pike made default in keeping the buildings insured, it was the right of the holders of the notes, and not the duty of the trustees, to have said buildings insured, and for any money advanced by the holders of the notes for such a purpose, and not repaid on demand, they have the right to have the property sold.

To the eighth interrogatory he saith:

8. The said James T. Pike did not place in the hands of this defendant the sum of one hundred and fifty dollars ($150) nor any other sum with which to keep the buildings insured.

And this defendant, having fully answered the so-called supplemental bill, and the interrogations therein contained, suggests to the court that the said supplemental bill, like the original and amended bill, is defective for want of parties, as hereinafter mentioned.

In accordance with the saving and reservation hereinbefor contained, he shows the following causes of demurrer:

1st. Multifariousness, in this, that the said supplemental bill blends three distinct matters, to wit, the removal of this defendant as trustee under a deed of trust made by Holden, King, and Ford, to se-
53 cure $38,000, in which the same Holden, King, and Ford have an interest, without being concerned in the other two matters; the conduct of this defendant as trustee under the deed of trust made by Ja's T. Pike, who has an interest therein, without being interested in the other matters; and the delivery up of a bond for $38,000, which the defendant holds, not as trustee, but as attorney and solicitor, on which James M. Carlisle has a lien as well as himself for fees, and to protect which lien the said bond is held by this defendant.

2d. Want of proper parties, which by the complainant's own showing are necessary parties, to wit:

(*a*) In this, that Holden, Ford, and King are not made parties. The deed of trust to secure $38,000 is made by them to John D. McPherson and Jesse B. Wilson, and the survivor of them, his heirs and assigns, and they have an interest therein, and therefore they should be made parties.

(*b*) In this, that Jesse B. Wilson is not made a party, for, owing to the limitations in the deed of trust to the survivor and his heirs, the legal estate could not be transmitted to a purchaser without the co-operation of the two trustees named, and the power of sale in said deed of trust contained could not be effectually extinguished, so far as this defendant is concerned, by the court exercising simply in personam relief, and no purchaser could with safety buy the title to said property without the co-operation of this defendant, whether removed or not by the court, unless the said party, Jesse B. Wilson, be made a party.

(*c*) In this, that if it be proper to blend the relief sought in the removal of trustee with the relief asked in delivering up the bond, James M. Carlisle has an interest in the said bond, as appears on the face of the supplemental bill, and he ought to be made a party.

(*d*) James T. Pike ought to be made a party.

(*e*) It appears by the supplemental bill that Harmon C. Westervelt and his wife and John E. Kendall are holders of the notes secured by
54 the deeds of trust by Pike, and have asked the trustees to sell, which shows that they are satisfied with the trustees; and if this defendant is to be accountable to the court as trustee in the premises, or is to be removed, the said parties should have an opportunity to be heard.

3d. The complainant, in asking the court to decree the delivery up of

the bond $38,000, does not offer to do equity by paying what she herself alleges she will honestly pay, $2,500, or offering to pay into court the sum of $5,000, which the evidence in this suit shows is due from her to this defendant.

4th. Because the supplemental bill relates to a title of different property, and a different title from that set up in the bill and amended bill, to wit: The bill and amended bill refer to a title created by Holden, King, and Ford, and the supplemental bill refers to a title created by Pike.

5th. Because the complainant has a complete and adequate remedy at law.

6th. Because the complainant has not stated such a case as does or ought to entitle her to the relief thereby prayed for against this defendant.

7th. The defendant craves the same benefit herefrom as if he had specially demurred, and as a reason for not specially demurring says that he did not wish the court to think that he was trying to evade an issue upon the allegations in said supplemental bill contained.

Having fully answered, he prays to be hence dismissed with all his reasonable costs.

JNO. D. McPHERSON.

I do solemnly swear that I have read the answer by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true; and that the causes
55 of demurrer in said answer set forth are not interposed for the purpose of delay.

JNO. D. McPHERSON.

Sworn and subscribed before me this 7th day of April, 1874.

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Ass't Clerk.

I hereby certify that in my opinion the demurrer in the answer contained is well founded in point of law, and that the answer was filed to show that defendant did not shirk issue on matter of fact.

GEO. F. APPLEBY,
Of Counsel and Solicitor for Defendant.

(Endorsement:) Answer of John D. McPherson to supplemental bill. The clerk will file this answer for supplemental bill. Geo. T. Appleby, sol'r for def't. Filed April 7, 1874. R. J. Meigs.

Exhibit J and M, No. 1.

John D. McPherson and Jesse B. Wilson, esq's, trustees under deed of trust given by James T. Pike upon lots No. 27 and 28, in square No. 312, to secure the payment of two notes for one thousand dollars each, dated January 2 and 3, 1872, two years after date, drawn by the said Pike to the order of Samuel Ford and C. H. Holden, with interest.

As the holder of these two notes, as described, I respectfully
56 request and direct you to proceed to sell, under the terms named

in the tract, the property upon which these notes (now overdue and not paid) are secured.

Prompt attention to this matter will oblige.

Very respectfully,

For M'r's H. C. WESTERVELT,
H. C. WESTERVELT.

WASHINGTON, D. C., *Febr'y* 3, 1873.

Exhibit J. D. M., No. 2.

J. D. MCPHERSON, Esq., and J. B. WILSON, *Trustees:*

GENTLEMEN: My friend Colonel James T. Benedict promised me to see you, to urge the sale of the property on the 11th instant on which M'r's Westervelt holds two notes of $1,000 each, for which he served you with the usual form of notice some weeks since, and proceedings on which were delayed to give M'r's Cox an opportunity of applying to the court for a new trustee, &c., which time has more than elapsed.

We now think, as we are perfectly well satisfied with the present trustees, (and have had no occasion to be otherwise,) and as their notes were payable two months ago, and as we have received neither principal nor interest, and as we have our rights in the matter quite as good for their extent as others, there ought to be no further delay; and we are therefore obliged to request the trustees to proceed with the sale.

I am, very respectfully, yours, &c.,

HARMAN C. WESTERVELT,
Office Sec'y Treasury.

WASHINGTON, D. C., *March* 2, 1874.

57 *Replication.—Filed April 11th*, 1874.

In the supreme court of the District of Columbia, the 11th day of April, A. D. 1874. In equity.

Between { MARY A. COX, COMPLAINANT, *and* JOHN D. MCPHERSON, DEFENDANT. } No.

The complainant hereby joins issue with the defendant, John D. McPherson, and will hear the cause on original and amended bills and answer thereto and on supplemental bill and answer thereto.

PIKE & JOHNSON,
Solicitors for Complainant.

Second supplemental bill.—Filed May 23, 1874.

In the supreme court of the District of Columbia, sitting in equity, May 23, 1874.

MARY A. COX, PLAINTIFF,
vs.
JOHN D. MCPHERSON, DEFENDANT. } No. 3268. Eq. Doc. 12.

To the honorable the supreme court of the District of Columbia, in chancery sitting:

The second supplemental bill of the said plaintiff, Mary A. Cox, in the above-entitled cause, respectfully represents—

That since the filing of the said supplemental bill, the said J. E. Ken-

dall, insisting upon a sale of lot 26, in block or square 312, in the bill and supplemental bill mentioned, under the deed of trust of said lot to the defendant, McPherson, and the said Wilson, for payment of the note of James T. Pike to Ford & Holden, by them endorsed, and held by him, the said Kendall, as is in the supplemental bill mentioned,
58 the said McPherson and Wilson advertised said lot for sale; and to prevent the purchase thereof by the said Kendall for the amount of said note, or at least for much less than its value, the plaintiff was compelled to raise the money at a large rate of interest and purchase the said note, and has done so, and is now the holder and owner thereof, it being for $1,000, due January 1, 1874, with interest to May 15, $82.35, and costs of protest $2.05; in addition to which she was compelled to pay costs of advertising, $38.25; auctioneer's costs, although there was no sale, $5; and to said McPherson and Wilson the extortionate and unconscientious charge, for half-commissions on $5,805, the sum of one hundred and fifty-five dollars, which she paid under protest.

Submitting to the court that merely for advertising the lot for sale, on the demand of Kendall, for payment of one note, the said trustees could not lawfully exact any commissions at all, and still less commissions on the amount of the notes which she held, and upon which she asked for no sale, and bought the one held by Kendall to prevent a sale. She submits, also, whether a man who would make such a charge and practice such extortion, in such a case and under such circumstances, is fit to continue to be trustee for one whom he hates and has grossly insulted in this suit by declaring her untruthful.

Wherefore she prays that the said McPherson may answer this supplemental bill, and for such relief as she has already prayed, and that he may be decreed to refund the money so exacted, in having been demanded by him and paid to him, and for general relief; and as in duty bound she will ever pray.

PIKE & JOHNSON,
Solicitors for Mary Cox.

DISTRICT OF COLUMBIA, *sct:*

I do hereby swear that I have read over the foregoing supple-
59 mental bill, and know the contents thereof; and that all the facts therein stated and the allegations therein made are true. So help me God!

MARY A. COX.

Subscribed and sworn to before me this 23d day of May, 1874.
[SEAL.] W. McNAMEE,
Notary Public.

Exhibit of 2d supplemental bill.—Filed May 26, 1874. R. J. Meigs.

Received, May 15, 1874, of P. H. Darneille, for M'r's Mary A. Cox twelve hundred twenty-two and 65-100 dollars, for the note of Ja's T. Pike, dated 1st January, 1872, secured by deed of trust to McPherson and Wilson on lots sub. 26, sq. 312, as specified in the following summary, viz:

1872. Jan. 1. Note, J. T. Pike to Sam'l Ford & C. H. Holden	$1,000 00
1874. May 15. Interest, 4 months 15 days	82 35
Cost of protest	2 05
	$1,084 40

Cost of advertising	$38 25	
Cost of auctioneers	5 00	
Half commissions, $5,805, claimed by trustees	145 00	
		188 25
		$1,272 65

JNO. E. KENDALL.

Add comm., P. H. D	$50 00
	$1,322 65
Balance cash	27 35
	$1,350 00

60 *Answer to 2d supplemental bill.—Filed July* 6, 1874. *R. J. Meigs.*

In the supreme court of the District of Columbia.

MARY A. COX, PLAINTIFF, *vs.* JOHN D. MCPHERSON, DEFENDANT. } No. 3268.

The answer of John D. McPherson to the second supplemental bill of Mary A. Cox.

This respondent admits the truth of the following averment in the second supplemental bill, viz: "That since the filing of the said [first] supplemental bill the said [John] E. Kendall, insisting upon a sale of lot 26 in block or square 312, in the bill and supplemental bill mentioned, under the deed of trust of said lot to the defendant, McPherson, and the said Jesse B. Wilson, for payment of the note of James T. Pike to Ford & Holden, by them endorsed and held by him, the said Kendall, as in the supplemental bill mentioned, the said McPherson & Wilson advertised the lot for sale."

This respondent does not admit the truth of the averment in the bill that "to prevent the purchase thereof by the said Kendall for the amount of the said note, or at least for so much less than its value, the plaintiff was compelled to raise money at high rate of interest and purchase said note." So far as regards the apprehended purchase of the property by Kendall for the amount of the note held by him, this respondent, as one of the trustees, would not have allowed the property to be sold for so small a sum. And so far as regards the plaintiff's apprehensions that the property would be purchased by Kendall "for much less than its value," that was a matter which in no way concerned the plaintiff or affected her interests. The defendant, as one of
61 the trustees, and he is confident his co-trustee also, would have taken care that the property should bring the amount of the first incumbrance, which he thinks is less than its real value. He has no doubt that at a sale properly conducted the property would have paid both the plaintiff's and M'r Kendall's demands. This respondent denies that the plaintiff was under any such compulsion. He is informed and believes that she is now in possession of the property, and if this be so, he deems it more probable that her purchase of the Kendall note was to give her entire control of the first incumbrance, and enable her to get the possession of the property.

This respondent does not know what sum, if anything, the plaintiff paid for the note held by M'r Kendall, and does not admit that she paid the sum stated by her, or any sum whatever.

It is wholly untrue that the plaintiff was compelled to pay this defendant and Wilson the sum of $145 for half commissions.

And notwithstanding the plaintiff asks this court to compel this defendant to refund the said sum to her, and avers that it was "demanded by him and paid to him," and swears, so help her God, that this averment is true, the averment is utterly and wholly false and untrue. This defendant has never received any money whatever for or on account of half commissions from the said plaintiff or the said John E. Kendall, and has never been informed, and does not believe, that the said Wilson, his co-trustee, has received any half commission. The simple fact is that when M'r Kendall contemplated withdrawing the advertisement, in pursance of his negotiation with the plaintiff, he called on this respondent and inquired what would be the amount of the expense incurred, for he had been informed when he ordered the advertisement to be inserted that he would be liable for the expenses, including half commissions, and had agreed to be so liable. When he inquired the
62 expenses, he was told that the auctioneer and publisher must be paid the expenses incurred by them, and the trustees would be entitled to their half commissions, according to the deed of trust, which provides that half commissions shall be paid if the property be advertised. These were computed at $145. This respondent told M'r Kendall the trustees would discontinue the advertisement if he desired it, holding him responsible for the half commissions; and it was at his request withdrawn, he assenting to this condition. Afterwards, M'r Kendall called on this respondent and offered to pay the half commissions, provided this respondent and M'r Wilson would sign an undertaking in writing, which this respondent did not read through, but which, upon a partial perusal, appeared to recite some transaction between the plaintiff and M'r Kendall about the sale of the note, and to bind this respondent and M'r Wilson to defend him in any suit that might be brought by the plaintiff against him, M'r Kendall. Seeing so much in the writing, this respondent told M'r Kendall he would not sign any such paper; that he knew nothing of and had no concern in his dealings with M'rs Cox; that he looked to M'r Kendall for his commissions, and did not want them unless he was entitled to them; that he conceived they were due according to the deed, and he looked to M'r Kendall alone for them. This respondent was just about leaving the office to fulfill an engagement, and this, as far as he remembers, was all that passed, except that he said he would see M'r Kendall some other time, which he has not yet found it convenient to do.

This respondent conceives it unnecessary to make answer to so much of the bill as recites, without distinctly charging, that he has been guilty of extortion in demanding the said half commissions; that he has libelled her by declaring her untruthful, and that he hates her; that he has been guilty of no extortion, as reference to the deed of trust will show; that the plaintiff has been untruthful in important particulars he
63 confidently believes will be, and is already, established by the evidence; and that as to his feelings of dislike towares her they have never influenced him to do any act whatever prejudicial to her interests, and are not proper objects of inquiry in this suit.

And being answered.

JNO. D. McPHERSON.

Sworn and subscribed this 6th day of July, A. D. 1874.

R. J. MEIGS,
Clerk S. C. D. C.,
By R. J. MEIGS, J'R,
Ass't.

REC. 199 5.

3d supplemental bill.

In the supreme court of the District of Columbia. In equity.

MARY A. COX, PLAINTIFF,
vs.
JOHN D. MCPHERSON AND OTHERS, DEFENDANTS.

The complainant, Mary A. Cox, by this her third supplemental bill, and by way of amendment of original bill, and first and second supplemental bills, unto the said supreme court in equity, respectfully represents:

That the defendant, by his answer to the original bill, insists that Charles H. Holden, Fannie E. Holden, his wife, Charles W. King, and Mary F. King, his wife, and Samuel Ford, and Ellen H. Ford, his wife, are necessary parties to the said bill as defendants, and has for their non-joinder demurred.

Wherefore, and to avoid delay, and that there may be no question as to the sufficiency of any title hereafter to be made by the said Wilson and the co-trustee to be substituted for the said McPherson, the said complainant makes the said Charles H. Holden, Fannie E. Holden,
64 Charles W. King, Mary F. King, Samuel Ford, and Ellen A. Ford, defendants to the said original bill and to said first and second supplemental bill, and prays for subpœna according to each, requiring him or her to appear, to the end that each may, if he or she shall see fit, answer the allegations of said original and supplemental bills, and that the complainant may have such decree and relief as in and by the same she hath prayed, and that decree divesting the said John D. McPherson of all rights, title, and interest in him as trustee vested under their deed, and vesting the same in the trustee substituted in his stead jointly with the said Wilson, may be made against the said other defendants, as well as against the said John D. McPherson, and that she may have such other and further relief as may be according to equity and as the nature of her case may require.

MARY A. COX.

PIKE & JOHNSON,
Of Counsel for Complainant.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Before the subscriber, a notary public in and for the District of Columbia, personally appears Mary A. Cox, who did solemnly swear that she read the foregoing supplemental bill by her subscribed, and knows the contents thereof, and that the facts therein stated upon her personal knowledge are true, and the facts therein stated upon information and belief she believes to be true.

In witness whereof I have thereunto subscribed my name and affixed my notarial seal this 15th day of *of* June, 1874.

CHAS McNAMEE,
Notary Public.

Filed June 15, 1874.

R. J. MEIGS.

65 *Answer to 3d supplemental bill.—Filed August 29, 1874. R. J. Meigs.*

In the supreme court of the District of Columbia, the day of August, 1874. Equity.

MARY A. COX, COMPLAINANT,
vs.
JOHN D. MCPHERSON ET AL., RESPONDENTS. } No.

The answer of Samuel Ford, Ellen H. Ford, his wife, Charles W. King, and Mary F. King, his wife, to the third supplemental bill of the above-named complainant.

In answer to the said bill, the said defendants state as follows: That the sole interest of these defendants in or arising out of the matters in litigation between the original parties to this suit is in the proposed removal of the defendant John D. McPherson from the trusteeship of certain property, as prayed in the bill first filed. These defendants feel now, as they did when the present trustees were selected, that in the event of a sale of the property mentioned it would be their interest to have the possession fall into trustworthy hands. Whilst they believe their interests abundantly secure under the present trustees, should a change be determined upon, their confidence in the court assures them that their interests will be sufficiently well guarded without their presence as defendants.

J. H. FORD,
Solicitors for Defendants Ford, King, and Wives.

(Endorsement:) The clerk will please file this answer. J. H. Ford, solicitor for Ford, King, et al.

Wairer of process.—Filed Nov. 5, 1874. R. J. Meigs.

WASHINGTON, D. C., *June* 19, 1874.

Mess'rs PIKE & JOHNSON,
Washington, D. C., Solicitors for M'r's Mary A. Cox:

GENTLEMEN: In Cox vs. McPherson and others, equity, No. 3268, we waive service of process upon ourselves as defendants in the above cause, and hereby give our assent to the appointment of a new trustee in place of M'r John D. McPherson, if deemed proper by the court, upon a hearing of the cause.

We are, sir, very respectfully,

CHARLES H. HOLDEN.
FANNIE E. HOLDEN,
By C. H. HOLDEN.

(Endorsement:) The clerk will please file this. Pike & Johnson, plaintiff's solicitors.

66 Supreme court District of Columbia.

COX
vs.
MCPHERSON.

DISTRICT OF COLUMBIA,
County of Washington, to wit:

Be it remembered that at an examination of witnesses began and held on the 15th day of January, A. D. 1874, and continued from time to

time until the 12th day of February, A. D. 1874, when the within depositions were taken, I, Richard L. Wallach, an examiner of said court, did cause to be present at my office, in the city of Washington, D. C., Samuel Ford and others, to testify on the part and behalf of the complainant in a certain cause wherein Mary A. Cox is the complainant and John D. McPherson et al. are the defendant'.

RICHARD L. WALLACH.
Examiner.

In the supreme court of the District of Columbia.

Cox
vs. } Equity.
McPherson.

THURSDAY, *Jan.* 15, 1874.

Met pursuant to agreement, and an order of the court to take testimony in the above-entitled cause.

Present, M'r Luther H. Pike, solicitor for complainant, and M'r Geo. F. Appleby, solicitor for defendant.

67 *Deposition of Samuel Ford.*

Whereupon SAMUEL FORD, a citizen of Washington, D. C., a witness of lawful age, produced, sworn, and examined on the part and behalf of the complainant, deposes and says:

Question. Please state whether you are the same Samuel Ford to whom, with Charles H. Holden and Charles W. King, M'r's Mary A. Cox sold square 312, in the city of Washington, on the 26th day of November, 1870.

A. I am.

Q. What amount was due from you to her for interest on purchase-money in June, 1872?

(Question objected to because it assumes the fact that something was due.)

A. I disremember the amount of the bond. It can be determined definitely by looking at the papers what the amount would be. I have a receipt which shows I paid $2,253.66, for one year's interest, due November 29, 1871. The interest on the balance to June 29, 1872, would be about $757. I do not pretend to exact accuracy, as I have not the data before me so to do.

Q. State whether you have before the 11th of June, 1870, been directed, required, or advised by John D. McPherson, esq., not to pay to M'r's Mary A. Cox the interest due her, and at what time any such direction or advice was given, or requirement made, and as nearly as possible in the very words what the same was.

A. No, sir; not before that date.

Q. If such direction, requirement, or advice was ever revoked, or any direction, advice, or permission to the contrary given to you by the said Jno. D. McPherson, esq., state when this occurred, and whether before or after the 11th of June, 1870, and as nearly as possible the exact words thereof.

68 (Objected to because it assumes the giving of an affirmative answer to the last question, which is not the case.)

A. After the 11th of June, 1873, or some time in June, 1873, (as my memory serves me,) M'r McPherson told me that I could pay her. I think he simply stated to me that I had better pay her.

Q. Was such directions, advice, or permission so given to you, as stated in your last answer, given on account of any direction or advice previously given to you by the said John D. McPherson, esq., not to pay to M'r's Mary A. Cox the interest due her? If so, at what time was such previous directions or advice given you? and, as nearly as possible, give the very words in which the same was made.

A. I think about three weeks previous to the last direction, in June, 1873, M'r McPherson directed me not to pay her, stating that the papers in the case were with him. I don't remember that he gave any other reasons.

Q. If you were present with Charles H. Holden and James T. Benedict at the office of the said Jno. D. McPherson, esq., at the time spoken of by him at paragraph 21, pages 6 and 7 of printed answer, state particularly the whole and all the details of that transaction, and particularly whether it was then and there, with the knowledge of the said Mary A. Cox, that the three notes mentioned therein were delivered to the said Benedict.

A. I was present at the time, but do not know whether M'r's Cox knew of the matter or not. I presume that she did. M'r's Cox was there. I met there by appointment to transfer some of the property. The appointment was made by M'r Holden. There was a dispute relative to the amount of discount which was to be taken off of the notes, which lasted some time, and which was settled by Holden agreeing to assume the amount in dispute. M'r's Cox was in and out of the
69 two office-rooms. There was no secrecy in the matter; there was no secrecy that I was aware of. I received a sum of money from Benedict or Storrs, and paid the amount of $2,000; also, $2,253.66 interest; also, twelve notes of James T. Pike, amounting to $13,000, which were secured on three houses.

Q. State whether it was or was not known to the said Mary A. Cox that the said three notes were secured by the deed of trust made to secure those made to her or for her benefit, and whether she did or did not know that they were to fall due a year sooner than any of those given to her?

A. I have no knowledge of the matter. I don't know at all. I don't know what she knew of the matter.

Q. With whom did you make the arrangement that those three notes should be secured by the deed of trust? If with John D. McPherson, esq., state when or what was passed between you and him in regard to it, and on what consideration he consented that money which you were to owe should be so secured.

A. I never made any arrangement with any one in regard to the notes: M'r Holden made the negotiation. This is as I remember now.

Q. State the date, amount, and time of payment of each of said three notes, how much money was paid for them by the said Benedict, and how much of it was received, and from whom, by the said Mary A. Cox.

A. I think the notes were dated the 1st, 2d, and 3d of January, 1872. The notes were of $4,000 each for two years from their respective dates. I think it was from $2,400 to $2,500 I received for said notes. I was informed by M'r Holden that a certain discount would be made, and at the office a heavier rate of discount was demanded by the parties who furnished the money, Benedict and Storrs. M'r Holden agreed to assume the difference between the amount demanded and what I had been led to believe by him would be demanded. This was done
70 by M'r Holden because I refused to stand the heavier discount.

All the money came into my hands, and was paid by me to M'r's Cox and M'r McPherson. I received the receipt from M'r McPherson signed by M'r's Cox. $4,253.66 was paid at that time to M'r's Cox and McPherson, as I find by the receipt in M'r McPherson's handwriting, signed by Mary A. Cox. I laid the money on the table, where they were both sitting. They were both present. I regarded them as one party.

Q. State anything further that you may know in regard to the matter as to which you have been interrogated that may be material in the case, or to the advantage of either of the parties herein.

Adjourned to Saturday, the 17th day of January, 1874, at 2 o'clock p. m.

SATURDAY, *Jan.* 17, 1874.

Met pursuant to adjournment.

Present, M'r L. H. Pike, for complainant, and M'r Geo. F. Appleby, for defendant.

Whereupon Samuel Ford answers the last question propounded at the last meeting:

A. I find that I paid a check to M'r's Cox, dated March 27th, 1873, after M'r McPherson directed me not to pay her, and before he removed his prohibition, which would seem to take the time back to an earlier date than June. I find from a memorandum that I was in error as to the amount paid M'r's Cox; that I paid her on that occasion $3,307.73; that shortly before that time I paid her $1,000. The error was caused by looking at the receipt taken on that occasion. This $1,000 was included in the amount named in that receipt. It is proper for me further to state that, in a conversation held with M'r's Cox some time during the summer, I suggested that the first notes named in the
71 trust would mature on the coming 1st of January, 1874. She seemed to think not, and afterwards, subsequent to that occasion, told me that she had seen M'r Benedict, and seemed surprised at the fact that she did not have the first notes. I believe that is all. Having answered to a previous interrogatory that "the interest on the balance to June 29, 1872, would be about $787," I wish to state that said interest was not due until November 26, 1872.

Cross-examination by Mr. Appleby:

Q. The other day when examined you stated that in June, 1873, M'r McPherson told you that you could pay M'r's Cox, that he simply stated to you that you had better pay her, and to-day you say that the date of M'r McPherson's removal of the prohibition to pay M'r's Cox was earlier than June; have you any data by which you are enabled to make the statement made to-day?

A. I am enabled to locate the time by means of a check given to M'r's Cox by me shortly after M'r McPherson's direction to me not to pay her, and shortly before he stated or suggested to me that I might pay her.

Q. Can you now state for certainty that M'r McPherson, before June, 1873, told you that you could pay her?

A. I think so.

Q. When M'r McPherson told you this, to what did he refer?

A. He referred to money due her by me for the interest. I believe there was no other account between us.

Q. Was the check which you gave M'r's Cox March 27, 1873, for such interest?

A. Yes, sir; or on account of such interest. I mean the interest on the bond for $38,000, given for the purchase-money of square 312.

Q. You speak of certain interest, due by you to her, being in arrear; please state why the same is in arrear.

72 (Question objected to, as it does not bear any reference to the examination-in-chief.)

A. Because I had not the money, and through the courtesy of M'r's Cox, and on account of the delinquency of others to me.

Q. I wish to ask you when you last had a conversation with M'r's Cox about the interest due her.

(Objected to, as it does not bear any reference to the examination-in-chief.)

A. I can't distinctly remember. She visits me occasionally; sometimes I call on her. We meet on the street frequently. When the last allusion to interest was made I can't locate exactly.

SAMUEL FORD.

Sworn and subscribed to before me this 17th day of January, A. D. 1874.

RICHARD L. WALLACH,
Examiner.

Deposition of Charles Ford.

CHARLES FORD, a resident of Washington, D. C., a witnes' of lawful age, produced, sworn, and examined on the part and behalf of the complainant, deposes and says as follows, to wit:

Q. State if you know Samuel Ford, who has testified in this case; and if you are related to him, state in what degree.

A. He is my brother.

Q. State, if you know, whether the said Samuel Ford had been directed, required, or advised by John D. McPherson, esq., prior

73 to the 11th day of June, 1873, not to pay any interest on any moneys to M'r's Mary A. Cox, and, if you know, at what time any such direction, requirement, or advice was given.

A. I don't know that M'r McPherson directed him not to pay.

Q. State whether you know of the revocation of any such direction, requirement, or advice, if any was given, or of any subsequent permission, consent, or advice given by the said John D. McPherson to the said Samuel Ford to pay moneys to the said Mary A. Cox; and, if so, when it took place or was given, whether before or after the said 11th day of June, and the exact substance and extent of the same.

A. I know nothing further than what my brother told me.

CHARLES FORD.

Sworn and subscribed to before me this 17th day of January, A. D. 1874.

RICHARD L. WALLACH,
Examiner.

Redirect examination of Samuel Ford:

Q. In response to question in cross-examination inquiring why certain interest due by you to M'r's Cox is in arrear, you answer, "Because I had not the money, and through the courtesy of M'r's Cox, and on account of the delinquencies of others to me." Please state now if M'r's Cox has made any demand or demands for payment of the same, or part of the same, prior to the 29th day of November, 1873.

(Question objected to, because it refers to time subsequent to the institution of this suit.)

74 A. I have no recollection of a special demand, though we have frequently talked over the matter, and I have been very anxious to settle with her.

SAMUEL FORD.

Sworn and subscribed to before me this 17th day of January, A. D. 1874.

RICHARD L. WALLACH.
Examiner.

Adjourned to Wednesday, the 21st day of January, A. D. 1874, at 2 o'clock p. m.

WEDNESDAY, *January* 21, 1874.

Deposition of James F. Benedict.

Met pursuant to adjournment.

Present, M'r Pike, for complainant, and M'r Appleby, for defendant; whereupon,

M'r JAMES T. BENEDICT, a resident of Georgetown, D. C., a witness of lawful age, produced, sworn, and examined on the part and behalf of the complainant, deposes and says, to wit:

Q. If you were present with Charles H. Holden and Samuel Ford, at the office of John D. McPherson, esq., at the time spoken of by him at pages 6 and 7 (section 21) of his printed answer herein, state particularly the whole and all of the details of the transaction, and particularly whether it was then and there, with the knowledge of the said Mary A. Cox, that the three notes mentioned therein were delivered to you?

75 A. I was present on the 6th of January, 1872, at the office of M'r McPherson, when the transaction which was closed between M'r Ford, Holden, and Pike for the purchase of the houses on Eleventh street, which I presume is in the square mentioned. At the request of M'r Holden, M'r Storrs and myself raised a certain amount of money to be paid to M'r Holden, he delivering to us certain notes secured on the property on Eleventh street. M'r Storrs paid over the money and received the notes. I say on the 6th of January, because it was the first Saturday in January when we closed the bargain. So far as M'r's Cox was concerned, she had nothing to do with either M'r Storrs or myself in delivering those notes. I did not know M'r's Cox at the time, and had no conversation with her at the time at all.

Q. With whom did you make the arrangement that those three notes should be secured by the deed of trust? If with John D. McPherson, esq., state when and what passed between you and him in regard to it.

A. My whole arrangement was made with Charles H. Holden, he to deliver to me the three notes which he mentioned.

Q. State whether it was or was not known to the said Mary A. Cox that the said three notes were secured by the deed of trust made to secure those made to her, or for her benefit, and whether she did or did not know that they were to fall due a year sooner than any of those given to her.

Q. What M'r's Cox knew about this I do not know, as I had nothing to do with her business.

Q. Who delivered to you the notes, and to whom did you pay the money?

A. The notes were not delivered to me; I did not pay the money. The notes were delivered to M'r Storrs by M'r Ford, I think, or M'r Holden. M'r Holden wished us to raise a certain amount of money for him; we did so. M'r Storrs had the money with him that we raised; I think it was about $4,000. M'r Holden left M'r Storrs certain notes as collateral security to raise the money. When M'r
76 Storrs had the money, we were to meet at M'r McPherson's office to pay over the money and receive these notes. We were notified by M'r Holden that everything was ready for the transfer of the money or the notes; we met there by agreement, in the afternoon of the day mentioned; M'r McPherson made the remark that he hoped we would settle it up that afternoon, as he had had a great deal of trouble in being kept from his home, we not coming to time. After we had assembled there was some little preliminaries to be settled between Holden, Ford, Storrs, and myself. M'r McPherson said he would send for M'r's Cox and have the matter settled; that he had given or sent a paper to her to be executed, which she had mislaid; that she had been at his office and was then over at her home; and he would send to her to bring the paper that he had sent her to execute. After waiting some time, M'r McPherson said that he could write another paper and have it executed while she was hunting for that one. She did come over to M'r McPherson's office, and M'r Storrs and myself did settle with M'r Holden and Ford, he (M'r Storrs) holding the money and paying the notes, M'r's Cox having nothing to do with us, not speaking to us in the matter. M'r Storrs wrote the notes, M'r Pike took the notes after they were written and signed them; Holden and Ford took the notes from the desk to another one and endorsed them, returned them to the desk where they were first written; M'r Storrs laid them out in series; M'r Ford took the notes, delivered them to M'r Storrs, (the three notes, $1,000 each;) M'r Storrs paid the money for the notes. That ended our transaction in the business at M'r McPherson's office.

Q. State whether anything had ever passed between yourself and M'r's Mary A. Cox relative to the transaction just spoken of in your last answer prior to the time therein referred to.

A. Not a word.

Q. State in whose possession said three notes now are.

77 A. I do not know; two of the notes did belong to M'r's Westervelt; the other did belong to M'r John E. Kendall.

Q. State the date, amount, and time of payment of each of said notes; what you paid for or advanced on them, or procured to be paid for or advanced on them, and how much of the same was paid to the said Mary A. Cox.

A. For two of the notes of $1,000 each, my impression is I paid $1,700. The other note, $1,000, was for M'r Storrs and myself to sell, to pay the money raised for M'r Holden on the collaterals, or *the* in other words, to reduce the amount of the loan, and the other notes to stand until he could pay it. The third note was sold for $800, to M'r Kendall, reducing the amount that we had borrowed for M'r Holden that amount. The date of the notes was January; (my impression is that one was dated the 3d, one the 2d, the other was the 1st or 4th; I can't say positively which, but my impression is that they were dated the 1st, 2d, or 3d of January, 1872. They were for $1,000 each and payable in two years from date. M'r Holden made the transaction with M'r Storrs and myself. After we met at M'r McPherson's office, M'r Ford was the man we dealt with instead of M'r Holden, and he, M'r Ford, was the man to

whom the money was paid, and from whom M'r Storrs received the notes. M'r Ford was the spokesman at M'r McPherson's.

Q. State what passed between you and Mary A. Cox in regard to said three notes, or one or more of them, in the summer of 1873, and whether before or after the filing of the bill herein, namely, 11th of June, 1873, and whether she did or did not know that you held one or more of said notes, before you conversed with or wrote to her on the subject, about that time, and whether she was not then, for the first time, informed of the existence of such notes secured by the deed of trust that secured those payable to her.

78 A. M'r's Cox called at my office in reference to some interest-money due her from M'r Pike, (M'r James T.) I conversed with M'r's Cox at the time in regard to certain notes that she held on this same property. In a day or two after she called at my office I visited her at her house, and paid her some interest-money due her for James T. Pike. In conversation with her I asked her about two notes she held, due about the same time as these three notes before mentioned; she informed me that she had not any notes due at that time. I was very much surprised, as I thought she had at that time two notes of $1,000; that these notes were given to secure the payment on five houses on 11th street, instead of three. She informed me that she had not, and produced the notes that she held, and they were due in 3, 4, 5, and 6 years instead of 2 years. She then explained to me that she had only received the notes for three houses instead of five. That was all the conversation I had with her in regard to the notes that I recollect now. She said that she had the first notes on those houses.

Q. You state in your last answer that M'r's Cox produced the notes that she held; how many of those notes were so produced by her?

A. I think twelve.

Q. State if you know or can say anything more or further in regard to the matters above inquired of, or to said three notes, that may be material in this case, or that can be of benefit or advantage to either party.

A. I can only say that M'r's Cox was very much surprised to know that she did not hold the first notes due on this property; she insisted that the notes I purchased were the notes due in six years instead of two, or whatever time the last notes were given. I recollect of nothing more in the matter.

(Answer objected to because it fixes no date.)

79 This occurred in the summer of 1873, but the exact day of the month I cannot say.

Adjourned to Friday, the 23d of January, 1874, at 2 o'clock, p. m.

FRIDAY, *Jan.* 23, 1874.

Met pursuant to said adjournment.

Present, M'r Pike, for complainants, and M'r Appleby, for defendant.

Whereupon cross-examination of James L. Benedict is commenced:

Q. Please state whether your relations with John D. McPherson are friendly or otherwise.

A. Friendly.

Q. Please state whether or not any time was consumed in the office of M'r McPherson between you and Storrs on the one side, and Holden and Ford on the other, touching the discount offered or exacted relative to the three notes of which you have testified.

A. Certainly some time was consumed.

Q. How long, or about how long, were you detained in M'r McPherson's office at the time of this transaction?

A. I should judge about three hours.

Q. Was M'r's Cox present during that time?

A. Part of the time she was.

Q. Was she present at any part of the time during the discussion of this discount?

A. She was.

Q. During any of the time that you were in M'r McPherson's office, was there a discussion between M'r Ford and M'r Holden respecting the discount mentioned?

A. Not in my presence; I presume they had a discussion, as
80 they went aside and had a private conversation; they returned to the table where we had the money; M'r Storrs had the money; said they had settled their business and we were to go on.

Q. About how long was M'r's Cox present in M'r McPherson's office when you were there?

A. I have stated that we were present, as near as I can recollect, for about three hours; I think M'r's Cox came to M'r McPherson's office, he having sent for her, about one hour after we arrived there, which, if the time that we were there is correct, she must have been there about two hours.

Q. Did the discussion or conversation between Ford and Holden take place after or before the discussion between you and Ford & Holden touching the discount?

A. It was after we had told Ford & Holden what our charges were; the discount mentioned there was not a discount on the notes, but our charge for raising the money for M'r Holden; we had made three negotiations for M'r Holden, the charges of which came out of the amount of money that we carried to M'r McPherson's office; that caused the discussion between Holden and Ford.

Q. Your business in M'r McPherson's office was finished as soon as you got the notes and paid over the money, was it not?

A. It was.

Q. And then you left the office, did you not?

A. We did.

Q. Do you know anything about the controversy which M'r's Cox has endeavored to make here with regard to the fee of $5,000 charged by McPherson & Carlisle touching certain services rendered in the recovery of square 312; I mean, of course, of your own knowledge?

(Question objected to because it is not made in reference to anything brought out in the direct examination.)

A. No.

81 Q. When you left M'r McPherson's office at the time of which you have spoken, was M'r's Cox still there, or not?

A. As I did not know M'r's Cox I took no notice whether she was left there when we departed or not; my impression was that she was there, but I cannot swear to it positively; M'r Ford was there when I left.

Redirect examination:

Q. You state that M'r's Cox was present at the transaction of the business at the office of M'r McPherson; please state now what part, if any, she and M'r McPherson had relative to the business that was then and there transacted.

A. I think I stated before, if I did not I will now, that M'r's Cox had

nothing to do with us in this business at all; I don't know that I heard her say one word about the business; M'r McPherson's business was with Holden & Ford, and not with us; our business was with Holden & Ford.

Re-cross-examination:

Q. Has not M'r's Cox, since this transaction, talked often and freely with you about this said transaction?

A. She has.

JAMES BENEDICT.

Sworn and subscribed to before me this 23d day of January, A. D. 1874.

RICHARD L. WALLACH.
Examiner.

Deposition of James T. Pike.

JAMES T. PIKE, a resident of Washington, D. C., a witness of
82 lawful age, produced, sworn, and examined on the part and behalf of the complainant, deposes and says as follows:

Q. Were you present at the office of John D. McPherson, esq., with Charles H. Holden and Samuel Ford at the time spoken of by M'r McPherson at pages 6 and 7 (section 21) of his printed answer herein?

A. I do not see that any time is specified in that printed answer, pages 6 and 7, but I was present when the transaction referred to was completed.

Q. Had you any connection with the transaction mentioned?

A. I had, as purchaser of certain property from Holden & Ford.

Q. Please state what transpired there in regard to the transaction mentioned, and particularly what part you, Mary A. Cox, and said John D. McPherson had in said transaction.

A. I received from Mess'rs Ford & Holden titles by warrantee deed to lots 24, 25, 26, 27, and 28, in square No. 312; I gave three several trust-deeds on lots 26, 27, and 28 respectively, to secure notes drawn by me to the order of Mess'rs Ford & Holden to the aggregate amount of $15,000; I mean $16,000 instead of $15,000; I further paid M'r McPherson the bill of items which was incident to the transaction; to the best of my recollection this was all I had to do with the matter: M'r's Cox was present during a portion of the time, but she sat apart from the gentlemen present, and took no personal action in the business; M'r McPherson transacted the business as agent and designated trustee for M'r's Cox.

Q. Had you, before the occasion referred to, had any conversation or correspondence with M'r's Cox in reference to the business then and there transacted?

A. I had not.

83 Q. State anything further that you may know in regard to the matters as to which you have been interrogated, that may be material in the case, or to the advantage of either party herein.

A. I do not think of anything further at present which, in my judgment, is material to the case.

Cross-examination:

Q. Were you a party to the bargain that day closed? And, if so, how long had the terms thereof been determined as far as you yourself were concerned?

A. As purchaser of the property named I had agreed upon terms

with Holden & Ford about three weeks prior to the sixth of January, 1872; upon which date the transaction was closed at M'r McPherson's office. The trade was matter of discussion between myself and Mess'rs Holden & Ford for about ten weeks before the 6th of January before mentioned.

Q. Had you not, prior to the 6th of January, 1872, made with Holden & Ford several engagements to meet at M'r McPherson's office to close the transaction?

A. I had several engagements with those gentlemen at M'r McPherson's office which were adjourned from time to time until the 6th of January, when our business was finally closed.

Q. Do you know the complainant, M'r's Cox? And, if so, have you seen her often recently? Or, in other words, have you, since June, 1873, seen her often?

A. I have known M'r's Cox since January, 1872, and have seen her occasionally since June, 1873.

Q. She is, as far as you know, a very intelligent lady, is she not?

A. So far as I know she is an intelligent lady.

JAMES T. PIKE.

84 Sworn and subscribed to before me this 23d day of January, 1874.

RICHARD L. WALLACH,
Examiner.

Adjourned to January 26, 1864.

Deposition of Charles H. Holden.

MONDAY, *January* 26, 1874.

Met pursuant to said adjournment, and adjourned to Friday, the 30th of January, 1874.

FRIDAY, *January* 30, 1874.

Met pursuant to said adjournment. (Present, M'r Pike for complainant and M'r Appleby for defendant.)

Whereupon,

Charles H. Holden, a resident of Washington, D. C., a witness of lawful age, produced, sworn, and examined on the part and behalf of the complainant, deposes and says as follows:

Q. Please state if you were present with Samuel Ford at the office of John D. McPherson, esq., at the time spoken of by him at pages 6 and 7, section 21, of his printed answer herein.

A. I was.

Q. Had you any connection with the transaction therein mentioned?

A. I had.

Q. What connection was that?

A. I was one of the joint owners of the square alluded to. I was chief manager and overseer in the construction of ten buildings referred to in the bill. I superintended the work, &c. It became necessary in this transaction for M'r Ford and myself to pay certain monies to M'r's

85 Cox. The time for the payment of the first instalment of the interest due her was passed. It became necessary for us to raise the amount due her. While negotiations were pending to raise this money due her, M'r Pike proposed to purchase five of those houses, on certain conditions, and assist me in raising the amount of money due M'r's Cox. Under our agreement with M'r's Cox, it was optional on our

part to pay money or secured paper representing money secured on the property. It was also optional when we should pay the debt, or rather, we had ten years to pay it in, provided the interest on the debt was paid annually in cash. M'r Pike's proposition to myself was to purchase five of those houses, for the sum of seven thousand dollars apiece. $13,000, the first payment to us, was in other property, the balance to be secured in notes running two, three, four, five, and six years, with interest payable annually; and he was to give us his open paper for $5,000, due in ninety days and six months. I conferred with my partner, M'r Ford, at his house, with M'r Pike, and the sale was agreed upon. There was a deed of trust for the purchase of the square resting on these five houses, which it became necessary to have released. I waited upon, or conferred with, her at her house, to see upon what terms this release would be made. She stated to me, as I thought at the time rather coolly, that she had an attorney, and referred me to him, stating that she would act under the advice of her counsel. I called several times at M'r McPherson's office before the matter was consummated, very much, I suppose, to his annoyance. The closing up of the transaction was on the 6th of January, 1872; I think the occasion referred to in my answer.

Q. Please state what transpired on that occasion in regard to the transaction mentioned, and particularly what part you, M'r McPherson, and M'r's Mary A. Cox had, respectively, in that transaction.

86 A. At the date mentioned, by appointment, I met M'r Pike, M'r Benedict, M'r Ford, and M'r Storrs. Mess'rs Benedict and Storrs were instrumental in assisting me in raising certain monies which were required to complete this transaction. I raised $1,800 on personal collateral, through Mess'rs Benedict and Storrs, as agents, and also about $2,600, I think, on three notes of M'r Pike, which was company property. M'r Ford was not satisfied with the rates of commission charged us on the three notes, saying he would never submit to such a shave. The matter was finally compromised, as I told M'r Ford that I would prefer to submit to the shave personally rather than have the transaction fail. I considered that through any failure at this time all would be lost, as M'r's Cox and her attorney had both been lenient, for the interest was more than a month overdue at this time, and so many propositions had been made that they had become burdensome. After this compromise was effected the papers were prepared, deeds and trust-deeds executed, and notes made, signed by M'r Pike, endorsed by myself and M'r Ford, and papers exchanged. I am not clear who prepared the papers: I know they were prepared in M'r McPherson's office. My attention was more especially given to the finance part of the transaction. I recognized M'r's Cox when she came in. She occupied a seat in the front office. Our business transactions, or my part of it, principally occurred in the back office. After the money was paid by Mess'rs Benedict and Storrs to M'r Ford, and the three notes referred to were by him turned over to these gentlemen, the other notes, I think, were transferred to M'r McPherson by M'r Ford, and also the money was paid over at the same time. I am not clear what part M'r McPherson had in the transaction. It was in this office. I was more interested in my own case.

Q. You say M'r's Cox took a seat in the front office, and that
87 the transaction mentioned was negotiated in the back office. Was M'r's Cox present in the back office at that negotiation?

(Question objected to because it is vague, in this, that it refers to but one negotiation, whereas the witness has spoken of two transactions, in

one of which he was concerned, and in the other of which he was not concerned, and spoke only of the transaction in which he was concerned as taking place in the back office.)

A. As I have stated before, M'r's Cox occupied a seat in the front office, and the transaction between myself and Benedict and Storrs was in the back office, and M'r's Cox was not present. M'r Ford was a party, and present in the back office. The money was counted out by Benedict and Storrs in the back office on the back table, and M'r Ford and myself were called in, and there M'r Ford objected on account of the percentage being so large, stating that he would not submit to such excessive charges.

Q. Did the execution of the notes, deeds, and trusts of which you have spoken form a part of the transaction to which you have referred in response to the second preceding interrogatories?

A. They formed a part of the transaction.

Q. State if you know or can say anything more or further in regard to the matters above inquired of, or to said three notes, that may be material in this case, or that can be of benefit or advantage to either party.

A. I don't know that I can state anything more than the transactions I have alluded to before. M'r Ford and myself discounted the three notes referred to to raise money in connection with money that I raised in personal collateral to meet the payments due M'r's Cox.

Cross-examination:

88 Q. How long was the conversation in the back office between you and Ford touching the discount?

Q. Only a few moments; it was short, sharp, and rather pointed.

A. Was it not loud and vehement in tone, especially on the part of M'r Ford?

A. He was considerably excited and spoke louder than in usual conversation, not very vehement.

Q. Between the front and back offices, occupied by M'r McPherson for law-offices, is there not an archway opening in which is situated a stove for the purpose of heating both offices?

A. There is.

Q. What kind of a doorway is there between the two offices?

A. A single door, of wood, I think; I couldn't say.

Q. Was it open or shut?

A. I think the door was ajar, or partially opened.

Q. When you and M'r Ford were in the bank offices where was M'r McPherson?

A. In the front office, I think.

Q. In the transactions to which you have referred in your direct examination as taking place in M'r McPherson's office was there any secrecy employed or enjoined by any of the parties for the purpose of keeping M'r's Cox in ignorance of anything done? If there was any such secrecy, please state the motive therefor, as far as you know.

(Objected to because the question calls for the expression of opinions by the witness and not testimony as to facts.)

A. There were no secrets enjoined, and no motives for secrets, as far as I know.

Q. Had M'r's Cox anything whatever to do with the matter of business about which you and M'r Ford, M'r Benedict, and M'r Storrs were engaged?

89 (Question objected to, as the question does not refer to the occasion inquired of in the direct examination.)

A. She had not.

Q. Had she, whilst being seated in the front office, any interest whatever in the result of your business transactions going on in the back office?

A. I don't know that she had any interest in the matter, any further than to get the amount due her; if our transactions in the back office had failed, she would not have received this money.

Q. Had the amount which you gave her that day been agreed upon before you went to M'r McPherson's office?

A. It had.

Q. For how long a time had the terms of purchase of the houses by M'r Pike been fixed before the 6th of January, 1872, the date of your meeting in M'r McPherson's office?

A. I cannot fix the exact time, but I should think about two weeks; may be more, may be less.

Q. How often did you see M'r's Cox about the matter spoken of in your direct examination?

A. I think I never called on her but once after the final terms were agreed upon between M'r Pike, M'r Ford, and myself in regard to the sale of the houses; I had called on her before, once or twice.

Q. Was there any difficulty between you and M'r's Cox about fixing and concluding your arrangement with M'r Pike? If so, what was the difficulty?

A. There was no difficulty; as I have before stated I only called on M'r's Cox once at her house, in which I was received rather coolly, and was directed by her to her attorney.

Q. Don't you remember that M'r's Cox refused to take all in notes for the consideration of the release to be by her given in order to
90 conclude your arrangement with M'r Pike, and insisted upon having part payment in money?

A. I know that was the ultimatum with her, and was so notified by M'r McPherson prior to the entering into the negotiations referred to.

Q. How many notes did you give M'r's Cox?

A. I never gave her any notes; but there were transferred to her all the notes referred to except the three which M'r Ford and myself negotiated.

Q. Were those notes so transferred secured by deed or deeds of trust?

A. They were all secured by deeds of trust on three houses, being three series of notes; one deed of trust on each house, and each deed securing an equal amount. James T. Pike was the maker of the notes, and M'r Ford and myself were the payees. M'r Pike is the grantor in the deeds of trust.

Q. After M'r's Cox told you to see her attorney about the matter, did you see him; if so, how often, and what did he do in the premises?

A. I went direct from her house to M'r McPherson's office. I conferred with M'r McPherson in regard to this matter, and he said he would confer with her; and it was after that he gave me her ultimatum, which I have spoken of in my cross-examination.

Q. What was this ultimatum, as near as you can remember?

A. As near as I can recollect the interest was to be paid in cash, and a certain amount of money, not exceeding $3,000, I think.

Q. Did you, in concluding the negotiation at M'r McPherson's office, at the same time make the arrangement for fulfilling the requirements of this ultimatum on your part?

A. I did not, at the same time. When the ultimatum was announced I conferred with M'r Ford, M'r Pike, and also with M'r Storrs and
91 Benedict, M'r Ford assenting to the best arrangement being made under the circumstances with this money. M'r Pike introduced me to M'r Benedict and Storrs, and through them the money was raised; and I think M'r McPherson so notified her. This transaction, I might state, was several days in maturing.

Q. You were enabled, were you not, in raising the money from Benedict and Storrs to fulfill the ultimatum of Mrs. Cox?

A. I was.

Q. You did do it on 6th of January, 1872, did you not?

A. I did, in M'r McPherson's office.

Redirect examination:

Q. Had you any personal knowledge as to M'r McPherson having conferred with M'r's Cox in regard to the transaction you speak of having called to see about, in accordance with M'r's Cox's direction?

A. I have no personal knowledge.

Q. Please state, if you can, how many of the notes secured by the deeds of trust were transferred to M'r's Cox.

A. I think four notes on each house, of each series of notes, making twelve notes.

Q. You say that all the notes referred to, except the three which yourself and M'r Ford negotiated, were transferred to M'r's Cox. Please state now if the three notes which yourself and M'r Ford negotiated were secured by a deed of trust on the same property as was secured to those transferred to M'r's Cox.

A. They were the same property: the same trusts covering them all.

Q. Why were they so secured; was that a part of M'r's Cox's ultimatum as made known to you by M'r McPherson?

A. M'r McPherson informed me upon what terms the matter could be closed, M'r's Cox taking a portion of M'r Pike's paper. There is
92 a stipulation in our bond or contract requiring us at any time, when paper is received or taken by her, that the amount taken is not to exceed three-fourths of the value of the property. I conferred with M'r McPherson, stating to him what paper we would have and proposing to turn over the amount thereof, less those three notes referred to. That was the ultimatum as I understood it.

CHARLES H. HOLDEN.

Sworn and subscribed to before me this 30th day of January, A. D. 1874.

RICHARD L. WALLACH,
Examiner.

The testimony is here closed, subject to the right acceded to by the attorneys for both parties herein to file the affidavit of Return J. Meigs, esq., clerk of the supreme court of the District of Columbia, in response to the two following questions, namely:

Q. 1. Please state when the bill in this case was first withdrawn from your office, and when it was returned.

Q. 2. By whom was it withdrawn, and what connection had the complainant with its withdrawal?

As to which questions, however, the defendant interposes the objection that they are irrelevant, because not embraced in the issue joined in this suit.

DISTRICT OF COLUMBIA,
County of Washington, to wit:

I, Richard L. Wallach, examiner, do hereby certify that in pursuance of an order of courts the foregoing depositions were taken down and by me reduced to writing, in the presence of and from the statement of the witnesses, at the time and place designated in the caption thereof, and were then and there by me read over to the witnesses and
93 by them subscribed in my presence, and in the presence of the solicitors for both parties, who were then and there attending. The witnesses having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, touching the matters at issue in said cause.

I further certify that I am not of counsel for any of said parties to this cause, or in any manner interested therein.

RICHARD L. WALLACH,
Examiner.

In the supreme court of the District of Columbia.

Cox
vs. } In equity. No.
McPHERSON.

DISTRICT OF COLUMBIA,
County of Washington, to wit:

Be it remembered that at an examination of witnesses begun and held on the 10th day of February, A. D. 1874, and continued from time to time until the 11th day of February, A. D. 1874, when the within deposition was taken, I, Richard L. Wallach, an examiner of said court, did cause to be present at the office of Carlisle & McPherson, in the city of Washington, D. C., James M. Carlisle, to testify on the part of the defendant in a certain cause now depending in the supreme court of the District of Columbia, wherein Mary A. Cox is the complainant and John D. McPherson et al. are the defendants.

RICHARD L. WALLACH,
Examiner.

94 Cox
vs. } Equity. No. 3268.
McPHERSON.

TUESDAY, *Feb.* 10, 1874.

Met pursuant to agreement of parties to take testimony for defendant, John D. McPherson, in above-entitled cause.

Present, Mr. Appleby for defendant, and Mr. Pike for complainant.

Deposition of James M. Carlisle.

Whereupon JAMES M. CARLISLE, a resident of Washington, D. C., a witness of lawful age, produced, sworn, and examined on the part and behalf of the defendant, deposes and says as follows:

I am a lawyer by profession, and know the parties to this suit; I have known the complainant for upwards of forty years; the defendant, Mr. McPherson, is my partner at law. [The professional services of Mr. McPherson and myself were engaged by the complainants to recover possession of square No. 312, city of Washington, D. C.]

(Within brackets objected to by complainant.)

Q. State in detail, as well as you remember, the circumstances of such engagement, and please also state whether or not at the time of such engagement any offer of compensation was made by complainant, and if any such offer was made, what was it; was the same accepted, and how and when was the same to be paid.

(Objected to by complainant's counsel as irrelevant, in this,
95 that the defendant's answer has not been made a cross-bill, and there is no issue in the cause upon the point which the question is directed.)

A. Some years ago the complainant called upon me and consulted me professionally as to her rights, obligations, and remedies concerning that property, and exhibited to me the contract of lease and privilege of purchase, which she had executed and delivered to Messrs. Angus and Lewis; that paper was, I think, in the handwriting of M. Joseph H. Bradley, s'r. On my first consideration of it, it seemed to me by no means easy to advise her satisfactorily and confidently. I think I requested that she should call on a subsequent day in order that I might consider it more attentively in the mean time, which I did to the best of my ability, being sincerely desirous of giving her safe and judicious advice. When she came again I communicated to her the conclusions which I had reached, and talked with her freely and fully upon the subject, rather as a friend than merely as counsel. I soon observed that she was counting upon my personal attention and activity in the contemplated litigation. I reminded her that I had restricted my practice to the Supreme Court of the United States and the Court of Claims, and that my blindness and increasing years made the practice in the nisi prius courts almost impossible for me; that the litigation, whatever should be determined upon, would necessarily begin by a suit or suits in the appropriate local court of the District of Columbia, and that I did not propose to resume my practice there. She combatted the difficulties I had suggested, and impressed me with the idea that she had relied confidently upon my being willing to manage the whole matter for her, and to give it my personal attention. I do not think she was, at that time, acquainted with my partner, the defendant, or, if at all, very slightly. I spoke of my confidence in his ability, learning, and fidelity, and said that he practiced in the courts of the District,
96 and that I would, without hesitation, commit to him any cause of my own, with entire confidence, as I had done those of my old clients who still resorted to me; and that, if the matter should go ultimately to the Supreme Court of the United States, as I had then no doubt it would, however the proceedings below might terminate, I would argue the cause for her there. She persisted in assuring me that she relied upon me alone, and should be satisfied with nothing short of my assuming the responsibility of the whole matter. She enlarged upon the importance of the case to her, and spoke of the value of the property if it could be cleared of all right in Angus & Lewis to purchase it at the price stipulated in the original agreement. She said that it would not be in her power to make suitable compensation except in case of success, but in that event she was willing, and would be quite able, to pay a large fee. Up to this time it had not entered my mind to make any stipulation with her about fees. I was quite ready to render her all the services in my power on the footing of friendship, and I think I so expressed myself then. She said she wanted it attended to as a business matter, and distinctly proposed, without the slightest suggestion on my part, that we should pay ourselves out of the fruits of the litigation the sum of ($5,000) five thousand dollars, contingent upon our success in

recovering the property. I told her if this should be satisfactory to M'r McPherson we would undertake it and do our best. Either then, or before she called again, I am not certain which, I conferred with M'r McPherson, and he expressed his willingness to accept her proposition. When we all three met in my study she repeated her proposition, and seemed entirely satisfied with our acceptance of it. The first intimation I ever had that M'r's Cox understood our agreement otherwise than as I have above detailed was by a letter from her received by me some time in March last, I think. The letter is without date, and I exhibit it here,
97 marked Exhibit "J. M. C., No. 1." It is in her handwriting. Until the receipt of that letter I had never heard of the sum of $2,500 as the amount of our compensation as suggested or contemplated by anybody, and I now repeat that the compensation offered by her and accepted by us was never at any time the sum of $2,500, or any other sums than the precise amount of $5,000, contingent as above stated by me; and I cannot conceive how M'r's Cox could so confidently write the contrary. I could not accept the distinction which she chose to make between myself and my partner, and I never replied to that letter. Perhaps for this reason M'r's Cox has never come near me since. I showed this letter to M'r McPherson as soon as I saw him, and he subsequently showed me the two letters from the complainant which I now exhibit, the one addressed to him and the other to us jointly, marked respectively "Exhibit J. M. C., No. 2," and "Exhibt J. M. C., No. 3."

Q. Did you and M'r McPherson act in concert, and, if you did, what was the result of the service rendered by you or either of you?

(Objected to as irrelevant.)

A. We did act jointly, and I believe that I was personally consulted in regard to the slightest detail of the litigation, however unimportant. I refer to the records of the supreme court of the District of Columbia, to show the proceedings, both at law and in equity, with more precision than could be done by any statement of mine. M'r's Cox was almost daily at our office, either in M'r McPherson's room or mine, and passing from one to another. I rather think, however, that she occupied his time more than mine. The litigation resulted successfully for M'r's Cox, and she recovered the square.

Q. Have you or has M'r McPherson, to your knowledge, ever been compensated for those services?

(Objected to as irrelevant.)

98 I believe I have never received any fee, great or small, from M'rs Cox in all my life, unless, which I do not know, some commissions on moneys collected may have been retained by M'r McPherson and passed to my credit in our partnership account. I have no knowledge of any compensation paid to M'r McPherson.

Q. Do you know anything about the bond of $38,000 the complainant in her bill prays may be decreed to be brought into court by defendant to be delivered to her. If so, in whose possession is the same? and please state whether or not you claim a lien thereupon?

A. I understand the bond referred to is that given by the purchaser of the property in question, after we had succeeded in the litigation. Although I participated in the consultations with M'r McPherson when he or M'r's Cox desired it, and approved all that was done, the matter had now passed almost entirely to M'r McPherson's management, and I believe that that bond is now in his possession or under his control. I understand it to be subject to the lien of M'r's Cox's contract with Carlisle & McPherson.

Q. During the period of the litigation referred to, what feelings or sentiments did you entertain or cherish for the complainant?

A. Always the most friendly until the receipt of her letter, Exhibit J. M. C., No. 1.

Q. During the period of the litigation referred to, did you know the pecuniary condition of the complainant, and, if so, what was it?

(Objected to as irrelevant.)

A. I had no accurate knowledge of her pecuniary condition. So far as I know she lived within her means, but occasionally had extra demands for taxes, &c., upon her purse, and occasionally applied to me for loans to meet them, which I never refused, considering them purely
99 friendly. I never kept any account of them other than by marginal notes in my check-book, and never charged any interest.

Q. Have you ever been paid for money so lent?

(Objected to as irrelevant.)

A. She never paid me a dollar in money, but at one time, at my request, she sent me some bottles of rare old wine, which I considered a payment on account, at whatever price she estimated their value.

Q. Did she ever speak to you about the services rendered by M'r McPherson in the premises?

(Objected to as irrelevant.)

A. She often expressed her satisfaction at M'r McPherson's attention to her interest, though she sometimes complained of the slow progress of the suits; but I understood my explanations on such occasions to be satisfactory.

Q. Please look at the letter now produced and filed in this cause, marked "Exhibit J. M. C., No. 4," and state if you know in whose handwriting the same is; and, if so, in whose?

A. The handwriting and signature are M'r's Cox's. (The introduction of the last letter objected to.) With the aid of the strong bi-convex glass which I use, I distinctly recognize the handwriting, with which handwriting I have long been familiar.

Adjourned to Wednesday, the 11th day of February, 1874.

WEDNESDAY, *Feb. 11th*, 1874.

Met pursuant to said adjournment, whereupon M'r L. H. Pike, complainant's solicitor, waived the right to cross-examine.

J. M. CARLISLE.

100 Sworn and subscribed to before me this 11th day of February, A. D. 1874.

RICHARD L. WALLACH,
Examiner.

The defendant here prays leave to refer at the hearing, to the record of the three deeds of trust made by Ja's I. Pike and wife, to John D. McPherson and Jesse B. Wilson, referred to in the testimony adduced in behalf of complainant, as made to secure the notes of Ja's T. Pike to Holden & Ford, which are recorded in liber 670, folio 67, 69, and 72, respectively, of the land records of Washington County, D. C., and he here produces the originals and prays leave to file the same, and prove them at the hearing, if necessary. The defendant also craves leave to refer at the hearing, and to read the same, the record of the deed of trust made by Holden, King and Ford, and their wives, to Jno. D. McPherson and Jesse B. Wilson, to secure the complainant as trustee, under the will of William Cox, the sum of $38,000.

Defendant here files three deeds of James T. Pike, above mentioned, marked, "Exhibits J. D. McP., Nos. 1, 2, 3," respectively.

The defendant here closes his case.

Adjourned, at instance of complainant, to Thursday, Feb. 12, 1874.

DISTRICT OF COLUMBIA,
County of Washington, to wit:

I, Richard L. Wallach, examiner, do hereby certify, that in pursuance of an order of court, the foregoing deposition was taken down and by me reduced to writing, in the presence of, and from the statement
101 of the witness at time and place designated in the caption thereof, and was then and there by me read over to the witness, and by him subscribed in my presence, and in the presence of the solicitors for both parties, who were then and there attending. The witness having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, touching the matters at issue in said cause.

I further certify that I am not of counsel for any of the parties to said cause, or in any manner interested therein.

RICHARD L. WALLACH,
Examiner.

In the supreme court of the District of Columbia.

MARY A. COX
vs.
JOHN D. MCPHERSON. } In equity, No. 3268. Doc. 12.

For complainant.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Be it remembered that, at an examination of witnesses begun and held on the 30th day of April, A. D. 1874, and continued from time to time by adjournment until the 29th day of October, A. D. 1874, when the within depositions were taken; and I, S. D. Anderson, an examiner in chancery, did cause to be personally present, at the office of Pike & Johnson, in the city of Washington, in said District, the within-named witness, to testify on the part and behalf of the complainant in a certain cause now depending in the supreme court of the District of Columbia, wherein Mary A. Cox is the complainant and John D. McPherson defendant.

T. D. ANDERSON,
Examiner in Chancery.

102 APRIL 30, 1874.

Met pursuant to notice, to take testimony for the complainant.

Present: M'r A. Pike, complainant's solicitor; and Mess'rs McPherson and Appleby, defendant's solicitors.

Deposition of M'r's Mary A. Cox.

Whereupon M'r's MARY A. COX, a witness of lawful age, a resident of Washington, produced, sworn, and examined for and by the complainant, deposes and says as follows, to wit:

1st. Are you the Mary A. Cox who is the party complainant in the

suit of Mary A. Cox against John D. McPherson, now pending in the supreme court of this District, in equity?

Ans. I am.

Int. Please state in detail the facts and causes that induced you to file your original (first) bill against M'r McPherson.

(The question is objected to by M'r Appleby, because issue was long since taken on said original bill, testimony taken, and case closed by complainant, and this testimony now comes too late, and is immaterial and irrelevant.)

The complainant's counsel here hands the witness a written answer to the last question and requests her to read it.

Whereupon counsel for defendant protests against the same. Objects to the witness reading anything in reply to the queston that has been written beforehand, and objects to her using it in any manner whatever, and asks that she be directed to answer the questions as and when
103 they are put to her, and in the absence of her so doing the counsel for defendant here requests the examiner to certify to the court the fact of the witness' attempt to read a prepared answer to interrogatories of her own counsel in the face of defendant's protest, and having certified the same to the court, to await the determination by the court whether or not such proceeding be proper when counsel for opposite side object.

The written answer is here withdrawn from the hands of the witness, and she says:

In the year 1864 I sold this property, square 312, to Mess'rs Angus & Lewis for $15,000. They violated their contract; I brought suit. When I determined to bring suit I went over to M'r Carlisle's office and told him what my intentions were. I said I had offered $2,500 to M'r John S. Callan, provided M'r Ward, a friend of his, thought the contract could be broken; M'r Callan told me that M'r Ward said he thought the contract could be broken; I then said to him (M'r Callan) "I will let you know to-morrow;" when I left M'r Callan, I thought I would go down and see M'r Carlisle; I told him what passed between M'r Callan and myself and what M'r Ward had said: M'r Carlisle said "Oh! he (M'r Ward) is nothing but a scrivener;" I felt a little uncomfortable at the remark, and raising my hand said, "M'r Carlisle, I will give any one $2,500 who will break that lease;" he said, "Well, I will speak to Johnny;" M'r McPherson came into the office while we were talking; M'r Carlisle said to him, "M'r's Cox is going to bring suit, and has offered $2,500;" M'r McPherson said, "Well;" they accepted with the utmost readiness, and I said I would bring over the lease; I did so, and the suit was commenced; some months after the case was decided, I resold to Holden, Ford, and King.

104 After the suit was decided, I was put in possession of the property; some time after that I sold to Holden, Ford, and King. They commenced putting up the brick houses, and they wanted four of the houses released to push the houses on, without compensation. M'r McPherson recommended me to release them, and I did so. Afterwards they wanted the six released. Colonel Holden approached me with the proposition; their interest was overdue; I declined to have any conversation with him about it, and referred him to M'r McPherson, the trustee. I believe one other proposition was made, which I didn't accept; I saw M'r McPherson afterwards, and he said they had proposed to pay me my interest and $2,000 on the principal, as they considered my releasing the houses a great favor, and security on the houses, as I understood it; I was to have $2,000 in money (interest); $2,000 on the

ground of the principal money due me, $13,000 in notes and security on the houses; in justice to M'r McPherson, I say he did not tell me this, but it was M'r Holden; M'r McPherson assured me that it was a safe business transaction.

On the 5th of January, 1873, I received a message from M'r McPherson to come over to his office and bring the release that he had given me besides; I could not find it, and when I got over there he had written another which I did sign. I was detained at home before I could go, looking for this release. I found M'r McPherson sitting at his table in the front office busy with something; I don't know what. I took my seat on his left, finding a chair there, and never rose from that chair until I was ready to come home. I heard voices in M'r McPherson's back office, looking into M'r Carlisle's back yard; and as they walked to and fro, resting for a moment on the sill between the two rooms, I recognized Holden and Ford, the owners of the property, Pike, to whom they had sold the houses, but a stranger to me, a M'r Storrs, a claim agent, and a person who, I afterwards learned, was a Colonel
105 Benedict. While they were in there, there was a murmer of voices; I turned to M'r McPherson and said, "They seem to be jarring." M'r McPherson, I thought rather tartly, "It is no concern of ours." After a while all of them came out, they bowed to me, and after talking a little with themselves they all left, with the exception of M'r Ford, who, advancing to the table where M'r McPherson was sitting, laid down a bundle of bank-notes and counted them out to M'r McPherson. He (M'r McPherson) then recounted them, and, looking up at him, said, "It's all right; $4,600." M'r Ford then said, "What do I owe you, sir?" And I think I heard, "$45, sir." M'r McPherson then turned to me and said, "Well, here is your money at last," mentioning the sum. I then said, "M'r McPherson, count out for yourself, $1,000; you know I promised to pay you this if Holden & Ford paid me. I still owe you $140, but as I am terribly in debt, you must wait a little while." I have since paid this $140, and this was all borrowed money that he had loaned me. In the meantime M'r Ford had left. When M'r McPherson counted out the money to me he deducted, in M'r Ford's favor, the interest on $445, the taxes for 1870, which Ford was to pay out of the ground. Then M'r McPherson handed me an envelope containing notes. He (M'r McPherson) said, "These are yours, twelve notes, calling for $13,000, due in two, three, four, and five years." He then offered to see me safe home. When I got home, I gave the envelope to my daughter. This was Saturday night, and on Monday morning I opened the envelope, looked at the notes for the first time, and observed that they were drawn in favor of Holden & Ford, and endorsed by M'r Pike, and not due in two, three, four, and five years, but in three, four, five, and six. In a few days I went over to M'r McPherson's office. He was busily engaged in writing. I said, "M'r McPherson, these notes are not due in two, three, four, and five years, but in three, four, five and six." Without lifting his head, he simply said, "Is that so?"
106 It was a matter of no moment to me, the discrepancy of time, because I expected to live on the interest, for the idea never entered my head that there was any wrong doing about the notes.

(Answer objected to by M'r Appleby, because it is not pertinent to the issue made by the supplemental bill; and because a part of it is hearsay; and because the same is irrelevant and impertinent.)

Int. State what conversation, if any, at the time you speak of, when the money was paid you in M'r McPherson's office, you had with any of

the persons you have mentioned as being there, or with M'r McPherson, about the business they were discussing.

(Objected to for the same reasons above, by M'r Appleby.)

A. Not one single word.

Int. State what, if anything, you then knew, or afterwards learned, as to any other notes having been executed at the same time with those delivered to you, and by James T. Pike; and as to their being secured by the same deeds of trust as secured yours.

A. On the 1st of January, 1873, one year's interest was due, and M'r Pike failing to pay, except in part, Colonel Benedict came to me to intercede for him. After calling several times, he alluded to other notes, but in such a manner as not to arouse any feeling or suspicion in me. He called again, after a little while, and in a rambling sort of way spoke of other notes. I knew nothing of any other notes than mine; at that time I said, "Colonel Benedict, what do you mean? To convince you that I have only twelve notes, calling for $13,000, I will go up stairs and bring my notes down;" I did so, and spread them out on the piano; he leaned over and said, "Well, I see you have only twelve notes,
107 but there are other notes." I didn't know what he meant. Very soon afterwards he took leave; in a short time he called again, and began again about other notes. I said, "If this interest isn't paid, I think I shall have to sell M'r Pike out." He said, "I should have no objection, for I have an interest in the matter." I said, "You have an interest in the matter; what have you to do with any notes of mine? I would like you to explain yourself."

He then informed me that he held two of the first notes for a friend in Georgetown, and M'r Kendall owned a third, each for $1,000, a lien on each one of the houses that had been given to me as security. I said, "Who gave you those notes?" He said M'r Ford; that he had raised the money ($4,000) to pay me on the evening I released the houses, with the express understanding that he was to have those liens for raising the money. I mean by the "first three notes" those that fell due in two years. Col. Benedict said to me, "When you heard us talking in that back room, M'r Ford objected to giving me notes, although he had promised them." He replied to M'r Ford, "Very well, I will put the money in my pocket, and you shall not have it for M'r's Cox," but Ford afterwards consented to give them up. I went up to M'r Ford, on Capitol Hill, and he denied that he gave them, and said, "Holden must have done that." I went to Holden, and he said, "No, M'r Ford did it." Afterwards M'r Ford admitted it, and said he thought I knew it, but they all, Benedict, Ford, and Holden, said they were given with the trustee's (M'r McPherson) approbation and knowledge. I understand that M'r McPherson drew the deeds of trust. I never saw the deeds of trust until I went to the recorder's office after this explanation from Colonel Benedict. I said to Colonel Benedict, "Put it on paper that I may carry it to my counsel." Believing my trustee antago-
108 nistic to my interest, losing all confidence in him, I consulted counsel, filed a bill in equity praying for his removal as trustee.

(Answer objected to by M'r Appleby for the same reasons as before given, and because they refer to collateral conversations between witness and persons not parties to this suit, and because witness is seeking to discredit testimony introduced in behalf of herself as complainant, that is, the testimony of Ford, Holden, and Benedict.

That the witness is seeking to discredit the testimony of either of them the complainant's counsel absolutely denies.)

Int. State what knowledge, if any, you had at the time spoken of, when

you received the money and notes, of the manner the money paid you was raised, or how it was secured, and when you first learned in regard to it.

A. I knew nothing about it. Colonel Benedict's information was the first knowledge I had about it.

Int. Look at the two papers now presented to you, and which, being stitched together, the examiner will mark "A, 1," and "A, 2," and state by whom they were written, and all the facts in regard to the matter therein spoken of.

(Objected to by M'r Appleby for the reasons given above.)

A. They are in the handwriting of M'r McPherson. From time to time I went to see M'r McPherson on other business. Not finding him in, I left a note. The paper filed and marked "A, 1," was his reply. A, 2, came with A, 1. I positively denied in my reply that I ever had offered $5,000 for this fee, and I refused to sign the lien, as I had never offered but $2,500, which they accepted with the greatest readiness, and there never was any reference made to the $5,000, or to any other claimed
109 sum by them until I received that note; and I again reiterate that that I never spoke of any sum as a fee other than $2,500.

Int. State what you know in regard to any instructions given by M'r McPherson, at any time, and when, to Samuel Ford, not to pay you interest on the moneys due you by him and Holden, and when they were countermanded, if you know.

A. After I filed my equity bill I saw M'r Ford and demanded my interest, which had been due a long time. He said M'r McPherson had instructed him not to pay me any interest, as he (McPherson) had a lien upon it as a fee. Not satisfied with telling him once, M'r Ford said he repeated it, and faithfully has M'r Ford carried out his instructions. I don't think he has paid me anything since the instructions were given, but I may be mistaken. Since the first year all that he has paid me is $500, and the discrepancy or difference is $900 in part for one year and $1,400 for the next. I received from his brother, M'r Charles Ford, three tons of coal in part payment.

(The last question objected to by M'r Appleby for the same reasons heretofore given, and the answer is objected to because it is hearsay.)

Int. State if you had had to pay insurance on the property, or any part of it, conveyed in trust to McPherson and Wilson to secure the notes of James T. Pike that you hold, and the reason, if you know or have been informed, why M'r Pike or the trustees did not keep the property insured.

(Objected to by M'r Appleby because irrelevant.)

A. After my deplorable experience about the notes I was advised to look after my insurance. I went up to the Treasury Department, saw M'r Pike, and asked him where my insurance papers were. He
110 said that M'r McPherson had them. M'r Pike said, "I gave him (McPherson) $150 to insure for the six years, the time the notes were to run." I got a gentleman to go M'r McPherson's office and ask him for the insurance papers. M'r Robert McPherson, his son, said that his father said he knew nothing about them. I went to the insurance offices and there was no trace of them there, and for the last eight months I have insured myself, the houses having been left for fourteen months to the mercy of the elements. After M'r Pike bought them from me there never was any insurance on them.

(The answer is objected to by M'r Appleby because it is hearsay.)

Int. Look at the check now presented to you, which the examiner

will mark A 3, and make a part of your deposition, and state for what it was given.

A. For the balance of the borrowed money.

Int. Look at the five papers presented, which the examiner will mark A 4, A 5, A 6, A 7, and A 8, and A 9, and state what they are.

A. A 4 is a copy of my answer to M'r McPherson's note, spoken of before. A 5 is his answer to my note. A 6 is a copy of the letter written by me to M'r Carlisle. A 7 is a note from M'r McPherson to me, and A 8 is my reply to it. A 9 is the letter of M'r McPherson to me.

The letters are here filed.

Int. State what claim, if any, M'r McPherson has to a lien upon the bond for $38,000 of Ford, Holden and King, to secure any fee due by you to Carlisle & McPherson, and whether any agreement was ever made between you and him, or you and him and M'r Carlisle, in regard to his retaining said bond as a security for such fee and how he came in possession of the said bond, and state all that you know that has a bearing upon these questions.

111 A. The bond was brought to my notice by M'r King, one of the original purchasers, who, having sold out to M'r Ford, met me in the street incidentally, and said he would like to have his name stricken off the bond. I saw M'r McPherson and mentioned to him what M'r King had said to me, and he simply replied, "Oh, no." Understandingly and knowingly, I never saw this bond or never laid my finger upon it and never had a word of conversation with M'r McPherson or M'r Carlisle on the subject of security, not even an allusion that they either desired or wished it; so that there is not a grain of truth in his (McPherson's) assertion that I ever gave him this bond that I never saw, as security for a fee of $5,000 which I never offered; therefore I positively, unhesitatingly, and unreservedly deny this most untrue statement. The bond came into his possession when the property was sold; this I heard from other parties, but I know nothing about it.

Int. Who prepared the papers to carry into effect your sale to Ford, Holden and King?

A. M'r McPherson.

Int. Look at the paper now presented to you, which the examiner will mark A 10, and state what it is, and whether, if the original was sent to M'r McPherson, you received a reply.

A. It is a copy of a note to him: I never received any reply.

Int. State whether Mess'rs Carlisle & McPherson collected any moneys for you from Angus & Lewis, for back rent on square 312; and, if so, what amount, and how much of it was retained by them or by M'r McPherson for fees and commissions, and advances?

A. In Angus & Lewis' first equity bill they stated that they owed, I think it was $1,350. After the suit was ended, they brought in and gave to Marshall Phillips $1,252.05. M'r McPherson, for his advances to me, and for $20, M'r Ashford's examination fees, and $12 for an injunction that they put in, and for fees and commissions for receiv-

112 ing it from M'r Phillips, $125.20. I received a check for the balance, $334.16, out of $1,252.05. I speak of it because he had a perfect right to take it.

Int. State if you borrowed any money from M'r Carlisle, how much has been repaid, how much wine you gave him in payment, how much you presented to him, what kind of wine, what its age and quality were, and what you value it at.

A. I present to the examiner a note I received from M'r Carlisle. It

is filed and marked "A 11." M'r Carlisle first loaned me $70. He knew that I had a long and exhaustive lawsuit, and that I had no income at all, and that I had great trouble about taxes. He, taking me by the arm, said, "I will never ask you for this," which I perfectly understood to mean not until I was able to pay him. The note, A 11, will show something of how we stand. I show it very unwillingly, because it is a private one. After the loan of the $70, he loaned me $300 more. I sent him fourteen bottles, all of the kind I had that I knew he wanted, and I presented him at different times with eleven bottles of sherry and madeira, all of which wine was over fifty years old, and if I put the same valuation on my wine that he does upon his services it is worth fully $250 per bottle. I sold to M'r Evarts some of this wine for $100 per dozen, but it was actually worth fifteen dollars per bottle.

Adjourned to May 2, 1874, 11 a. m.

ANDERSON, *Ex.*

MAY 2, 1874.

Met pursuant to adjournment.
Present, Mess'rs Pike and Appleby.

Whereupon M'r Appleby, for defendant, without waiving the objections heretofore taken, cross-examines the witness, M'r's Cox.

113 Int. Please state when you went to M'r John F Callan's.

A. Two or three days before I went to M'r Carlisle's.

Int. Where was M'r Callan's office?

A. On Louisiana avenue, between 6th and 7th streets.

Int. Is he living or dead?

A. He is dead.

Int. Did you go to any other person before going to M'r Callan?

A. I did not.

Int. Was M'r Callan a lawyer?

A. I don't know what his occupation was. I know he was a business man.

Int. Don't you know that he was not a lawyer?

A. I don't know whether he was or was not; I don't think he professed to be one.

Int. Did you ever hear of his being a lawyer?

A. Not that I remember. He was not to take the case himself; he was to employ a lawyer.

Int. To what M'r Ward do you refer?

A. To a M'r Ward who lives on Four-and a-half street. I think he is an examiner of titles. I don't know his name.

Int. When did you go to M'r Carlisle's office for the first time, respecting the suit of which you have spoken in your direct examination?

A. After M'r Callan told me that he had an interview with M'r Ward, and M'r Ward thought that the lease could be broken, M'r Callan told me this, and then asked me, "Now, will you give it to me?" I said, "Wait until to-morrow." When I got up to M'r Fendall's corner, I thought I would run down and tell M'r Carlisle what I thought of doing.

Int. Did you then see M'r Carlisle?

A. I did.

Int. About what year was this?

114 A. I think the suit was brought in 1869.

Int. By whom was the suit brought?

A. By Carlisle & McPherson.

Int. What time elapsed between your seeing M'r Carlisle about the suit and the institution of the suit, or about what time?

A. A very short time. I can't give you the day or hour.

Int. What do you call a short time?

A. I sometimes call a short time a few weeks, a few days, and in some cases twenty-four hours.

Int. What was the suit to which you refer?

A. Angus & Lewis suit, the suit against them to recover square 312.

Int. The square was recovered, I believe?

A. It was.

Int. Have you ever paid Mess'rs Carlisle & McPherson or either of them any compensation for services rendered in that behalf?

A. I have not; I was not to pay them until it was perfectly at my convenience, and until I realized it from the proceeds of the ground.

Int. Have you, out of the proceeds thus far received, given anything to them for their fee?

A. I have not.

Int. After the marshal paid M'r McPherson the $1,250 of which you have spoken, did you not receive $1,500, or thereabouts, the result of *of* a suit versus Angus & Lewis, for mesne profits?

A. I received a note for $1,500, bearing 6 per cent. and running for one year, part of that $1,500, extending the time three or four months, I think longer, and which is not yet entirely paid; that has been my dependence during this 15 months for myself and family.

Int. Have you ever offered this $1,500 as part payment of the fee due them?

115 A. Certainly not.

Int. Have you ever offered any of the other notes which you have received for the property?

A. I have not, for I depend upon that for the interest money to live upon, , which I have never gotten but a few hundred dollars.

Int. But you received $2,000 in cash, did you not?

A. I did.

Int. That was all of the cash paid at the time, was it?

A. No; there was $4,000 paid.

Int. You speak in your direct examination of M'r McPherson's deducting $125 for fees and commissions when he collected the $1,250; did he not institute an action at law to recover this $1,250?

A. I don't know whether he did or not; they acknowledged it to be due in their equity bill, and said they would bring it into court when required to do so.

Int. Did M'r McPherson tell you why you should not take the money which they offered to bring into court?

A. He never said anything about it.

Int. Did not M'r Pherson tell you that they offered to pay more than was due you before the forfeiture of the lease had accrued, and that if you had took the whole amount offered it might be held a waiver of the forfeiture?

A. I have no recollection of his saying anything on the subject to me.

Int. Did he not then state that since they admitted the amount due, a suit at law could be instituted to recover the amount?

A. Not that I recollect.

Int. Don't you know that you made an affidavit to be filed in a suit to recover the rent due before the forfeiture of the lease, and that the same was filed?

A. I do not; I have no recollection of anything of the kind.

116 Int. What commission did M'r McPherson charge for collecting the $1,250 spoken of?

A. Ten per cent.

Int. What fee did he charge, since you say he charged fees and commissions?

A. I really do not know; it was simply written out "fees and commissions, $125," in the account rendered me in the name of Carlisle & McPherson.

Int. I understood you to say that you did not like this action on M'r McPherson's part; did you say so?

A. I did.

Int. Why not?

A. Because I expected to pay and had offered $2,500 as my fee, and thought that any rent recovered would have been included in this fee.

Q. Is this really the reason why you felt angered at the time?

A. It was.

Int. Had you not promised to pay their compensation for the recovery of the ground as and when the same should be realized?

A. I expected to pay $2,500 for the whole business; the recovery of the rent and square.

Int. And not as the same should be realized in the sales to be made of the property?

A. I did not understand it so.

Q. You expected to pay the whole fee due by you at one time?

A. That depended on circumstances.

Int. Then what did you expect to do in the premises?

A. I expected to pay as I realized sufficient money from the square to enable me to do so.

Int. Is that what you meant when you wrote to Mess'rs Carlisle & McPherson, March 20th, '73, that the fee "was to be paid out

117 of the proceeds of sales of the property as such proceeds shall be realized," as appears from your exhibit marked "A 8?"

A. I expected and desired to pay as soon as I got the money to pay.

Int. How long after the transaction which occurred in M'r McPherson's office, January 5th, '73, of which you have spoken, was it that you first saw Col. Benedict?

A. It was over a year.

Int. Where did you see him?

A. In my parlor.

Int. What did he come there for?

A. To intercede for M'r Pike, for non-payment of interest.

Int. Had you been at Col. Benedict's office before that time?

A. I think not; I have no recollection of it.

A. How often did Col. Benedict come to your house?

A. Two, three, perhaps four times; I don't recollect which.

Int. What interval of time was there between the visits which he paid?

A. Perhaps a month; at other times perhaps two or three months; I don't recollect which.

Int. Did you ever go yourself to M'r McPherson's office to inquire about the insurance?

A. I did not.

Int. Did you not go there after the Chicago fire occurred, and speak to him about the insurance on the property in dispute?

A. I did; after the Chicago fire I went to M. McPherson's office and

inquired if he had looked at the policies that Holden & Ford gave him when they commenced to build first, and if they were endangered by fire. There was an insurance, I think, that they called a builder's risk. I had nothing to do with it at all. I asked M'r McPherson if he had better not look. He said he had not. He was very much
118 engaged, and I said, "Give them to me, and I will ascertain whether they are good, bad, or indifferent." I went up to M. Hansom's office, on 7th street, who keeps an insurance office, and got him to examine. He told me three or four of the companies had broken, and two had not. I gave that information to M'r McPherson, and some time after that Colonel Holden told me that they transferred these insurances to some other company. I do not believe there was any further insurance upon those houses by the builders themselves. I meant by "having nothing to do with them," that I had nothing to do with having them insured, or looking after them. It was an act of kindness on my part.

Int. Do you know in what other companies the insurance was effected?

A. I don't know one of them, or anything about them.

Int. How, then, do you know that they have not been kept insured?

A. My general disbelief, and the promises made by the parties who said they would turn over the insurance to other companies.

Int. Disbelief of what parties?

A. Holden & Ford.

Int. Was not James T. Pike, at the time you are speaking of, bound to insure the houses?

A. I presume he was. The deed of trust will show that.

Int. Then Col. Holden spoke to you about the transfer of insurance after the time when you met him, Ford, and Benedict in M'r McPherson's office?

A. Long before M'r Pike ever bought those houses at all.

Int. How long before?

A. I don't recollect.

Int. About how long?

A. I can't tell; I don't recollect.

Int. How do you know it was before?

119 A. From my first recollection of the time.

Int. What fixes this time?

A. Good memory.

Int. Was it a year before?

A. I don't recollect.

Int. Was it a month before?

A. I don't recollect.

Int. Don't you know that it was after?

A. I positively know that it was not after.

Int. Did you ever inquire to know to what other companies the insurance was transferred?

A. I did not.

Int. How, then, are you enabled to state that for fourteen months the property in dispute was left to the mercy of the elements?

A. Because I heard Col. Holden and M'r Ford say that the property, these three houses that were sold to Pike, were insured for the entire six years. I was perfectly satisfied, and believe that they were so. I went to M'r Pike and asked him for the insurance papers. He said M'r McPherson had them; that he had given M'r McPherson $150 to pay the insurance. I sent to M'r McPherson. He was not in his office,

but in a day or two the same gentleman saw M'r Robert McPherson, who said that his father had so told him, on speaking to him, that he knew nothing about it. I went around to several insurance offices, and begged them to look upon their books if three houses on 11th street, numbering 26, 27, and 28, were insured in their offices, and I could gain no knowledge of them.

Int. What gentleman did you send to M'r McPherson's office?

A. M'r Tom Bradley.

Int. Is this the only foundation you have for swearing that the houses were for 14 months left to the mercy of the elements?

120 A. It was, and a very reasonable one. M'r McPherson said he knew nothing about them, according to M'r Bradley's statement.

Int. How do you fix the time 14 months?

A. Because January 1, 1873, M'r Pike's first year's interest was due; he did not pay it, except in part, until the last of January, and then quite a month afterwards he paid another small portion, and when Col. Benedict informed me about his having the first notes, a lien upon the property, upon the identical houses, I understood was given to me for my special security, and which I heard for the first time, and was told I had better look after my insurance papers; I did so, with the result that I have stated; I then insured myself month by month for the last eight months, M'r Pike, M'r Ford, Col. Benedict all declaring themselves not bound to do so; I fix the time 14 months, to the best of my recollection.

Int. You then don't know what time the houses were insured for in the companies to which the insurance was transferred?

A. They (the houses) had nothing to do with the first insurance. I refer to the houses sold to Pike. The builder's risk had nothing to do with them; they were insured long before Pike bought them by the builders themselves; the houses sold to Pike were never insured at all; they were covered part of the time by the builder's risk before Pike purchased them.

Int. Can you tell how much interest Pike paid in January, 1873?

A. $650.

Int. Who paid this?

A. M'r Pike paid $500 and Col. Benedict $150.

Int. Was anything paid by Pike for interest after that?

A. No, sir; M'r Pike himself paid $500 in my parlor.

Int. That was after M'r Benedict saw you?

A. No; it was before.

Int. How long before?

121 A. I can't tell you exactly the month; it was some months.

Int. Where were the notes on which Pike paid this interest drawn by M'r Pike?

A. I really don't know; but I presume at M'r McPherson's office.

Int. To whom were they made payable?

A. To Holden & Ford.

Int. Did you see Holden & Ford endorse them?

A. I did not.

Int. Did you see Holden & Ford endorse any notes in M'r McPherson's office at the time spoken of?

A. I did not.

Int. Did you see M'r Pike sign any notes?

A. I did not.

Int. Did you see M'r Storrs draw any notes to be signed by M'r Pike at M'r McPherson's office at the time spoken of?

A. I did not.

Int. Have you found the paper for which you were hunting on the day that the transaction spoken of in M'r McPherson's office occurred?

A. I have.

Int. How long did you have that paper in your possession before you were called on to bring it?

A. A very short time, as far as my recollection serves me.

Int. Had you not been at M'r McPherson's office that afternoon before you came there and met the gentlemen assembled?

A. To the best of my recollection and belief I don't think I was.

Int. How came you to be hunting for it?

A. Because M'r McPherson, I think, told me the men were to meet me there, and for me to bring the release over; but previous to
122 saying they were to be there, he spoke to me about the release, and I must have told him that I could not find it.

Int. Was another paper drawn up, another release? If so, was it of like effect and same support?

A. I presume that it was a duplicate of the one he gave me, but I did not read it; I simply signed it.

Int. When did you sign it?

A. The evening I went over there to meet those gentlemen.

Int. Did you acknowledge it that evening?

A. I did not.

Int. How are you enabled to fix the date of this transaction?

A. I don't remember the day of the month.

Int. How long were you there?

A. From an hour to an hour and a half or two hours.

Int. It was dark when you left?

A. It was.

Int. Was there a light in the office?

A. I don't remember, but think not.

Int. Have you, in your direct examination, stated all that occurred in your presence in M'r McPherson's office on that occasion?

A. To the best of my belief and recollection, I have.

Int. What was done with the release after you signed it?

A. I do not know.

Int. Did any of the parties spoken of by you as being there walk to and fro in both front and back office?

A. They did not: they came no farther than the sill of the door.

Int. Where was M'r McPherson?

A. Sitting at the table when I went in attending to his business; he was sitting in the office leading in from the street.

Int. Who was in that office-room besides M'r McPherson when you went there?

123 A. I do not recollect.

Int. Was there anybody?

A. I don't remember.

Int. About how long did M'r Ford remain in the front office after Benedict, Storrs, and others left?

A. I don't think more than 10 or 15 minutes; I can't fix the time accurately.

Int. About how long did you remain after M'r Ford left?

A. To the best of my belief and recollection, not more than 10 or 15 minutes.

Int. Are you sure that this transaction occurred on a Saturday evening?

A. I believe it did.

Int. In what denomination of money was the $4,000 paid?

A. I don't know.

Int. You say it was counted; was it a large or small roll or package of money?

A. I really don't know.

Int. It was small enough to be put in an envelope, was it not?

A. I don't remember.

Int. Do you know whether it was in gold or currency?

A. I saw nothing but bank-notes.

Int. Did you, on the morning you speak of as having gone to M'r Carlisle's office to speak to him about the suit, engage his services?

A. I presume I did.

Int. Had you, before seeing him, spoken to M'r McPherson about the suit?

A. Not that I recollect.

Int. Did you not say to M'r McPherson, before you saw M'r Carlisle, that you intended to bring a suit for M'r Carlisle to conduct?

A. I did not.

124 Int. What did M'r Carlisle say when you first spoke to him about it.

A. He said he would speak to Johnny.

Int. Whom did he call "Johnny?"

A. M'r McPherson.

Int. When did he first speak to M'r McPherson about it to your knowledge?

A. About 10 or 15 minutes after I spoke to him; it was while I was sitting there; M'r McPherson came into M'r Carlisle's room.

Int. About how long did McPherson remain there?

A. Not a great while. I know that M'r Carlisle said, "McPherson, M'r's Cox is going to bring suit, and has offered $2,500."

Int. Did they then and there on that morning agree to take this suit?

A. They did, without a demurrer.

Int. Did they then and there advise you to bring suit, or say that you had a good cause of action against Angus & Lewis; or had you already, before going to M'r Carlisle, determined to bring suit?

A. They told me to bring over the lease to examine. I had, of course, determined to bring suit. They could not advise me to do anything until they looked at the papers.

Int. After looking at the papers, what did they determine to do?

A. They thought it was a good case, but there were some difficulties growing out of the manner in which the lease was written.

Int. Was it a case arising out of the forfeiture of the lease by Angus and Lewis?

A. It was.

Int. When they said that you had a good case, did they say that the lease was forfeited; and, if so, about how long was this after you took them the lease?

125 A. They could not determine what was to be done until they examined the lease. After examining the papers they said they thought the lease was forfeited. I suppose it was only a few days after I took them the lease that they said this.

Int. Did you make a promise to M'r McPherson, independently of M'r Carlisle, to compensate services to be by him rendered?

A. Never.

Int. Did you, separately from M'r Carlisle, and on another occasion, promise M'r McPherson any compensation for services to be rendered?

A. Undoubtedly not; I never separate a firm. When I made the offer it was bona fide, and it was $2,500. It was in M'r Carlisle's office. I don't think it is usual to go and offer one thing, and then go and change the fee.

Int. Did you, M'r's Cox, ever agree with Holden & Ford to release, as fast as money was paid, three feet of ground for every two dollars paid?

A. I certainly never did, for I don't even comprehend it. I never did by any oral agreement. I left everything to M'r McPherson.

Int. Did you not know at the time that you sold the property to Holden, Ford and King that a bond was to be given for the purchase money?

A. I have no recollection about a word being said to me about a bond. Everything was left to M'r McPherson. I relied upon him implicitly. He gave me the deed of sale to acknowledge, which I did. I took it for granted there would be a deed of trust upon it. I didn't know whether there were to be notes or what. I heard afterwards the bonds spoken of, but to the best of my recollection I never saw it. M'r McPherson held the other papers, and took it for granted that he held the bond as security for the payment of the ground.

Int. Was the sale to Holden, Ford, and King to be a sale on credit, or was any cash paid?

126 A. There was no cash paid.

Int. Did you ever hear of any but the one bond which you have spoken of given for the purchase money of Holden, Ford, and King?

A. I never did.

Int. Did you not speak to M'r McPherson about this bond?

A. Yes; I told him that M'r King wanted to be released.

Int. Did you not before that time?

A. Not that I have any recollection of.

Int. Did you not desire to know what was given by Holden, Ford, and King for the consideration of the deed which you gave to them, and did you not, soon thereafter, ask M'r McPherson where the bond was, and where he kept the same?

A. I recollect nothing at all about it; I have no recollection of making any inquiries.

Int. Have you not, in the office of R. J. Meigs, clerk of the supreme court of this District, spoken in a public manner, and within the hearing of persons other than those to whom you addressed your remarks, of M'r Carlisle and M'r McPherson as extortioners, and, at one time, as black-mailers?

A. I have spoken of the fee which they say I offered them, and which I never did, of $5,000, as extortioners, as I really think they are; but the expression of "black mailers" I never made use of in my life.

Int. Do you know T. L. Tullock, of this city?

A. Perfectly well.

Int. Did you not, in his office, speak of these gentlemen, in the presence of numerous others, to the same effect?

The question is objected to by M'r Pike as irrelevant, and as unnecessary, and protracting the cross-examination.)

127 A. I never made use of the words "black-mailers." I have spoken of the fee of $5,000 charged by them, and which I never offered, as a shameful extortion.

Int. Did you not, before the filing of the present suit, speak to several of the judges of our court about this fee, and what you thought about it?

(Objected to by M'r Pike for the same reason as before stated.)

A. In the first place, I don't know but two; I think it is very probable that I may have expressed myself to Judge Olin about this fee, as I have spoken to everybody I know. Judge Olin would make no remark whatever. I was not talking to him but to his wife; and to Judge Cartter I never spoke at all. I had a very small acquaintance with him.

Int. Did you, just after the institution of this suit, and before M'r McPherson's answer, send or procure to be sent to the house of Judge Wylie the bill filed by you; and, if so, what was your object in so doing?

A. I did not send or procure to be sent the bill filed by me to Judge Wylie's house.

Int. Don't you know that at your instance the bill was sent to M'r Justice Wylie?

A. I do not. I expressed a great desire to young M'r Meigs, assistant clerk of the court, that Judge Wylie should have the bill to expedite matters, as M'r Tom Bradley told me that M'r McPherson said he had no objection to my having any other trustee than himself, if I selected a good man. I asked M'r Meigs to hand it to Judge Wylie, not at his house, but at the court-room; I presume M'r Meigs did so; it was locked up in Judge Wylie's desk for several months, and I don't believe that Judge Wylie knew what it was.

Int. Was that your only object?

128 A. That was my only object. I had no idea there was any impropriety in it, and I expressed my regret to M'r Meigs, for I think Judge Wylie was very angry.

Adjourned to May 12, 1874, at 11 a. m.

ANDERSON, *Ex.*

MAY 12, 1874.

Met pursuant to adjournment.

Present: Mess'rs Pike and Appleby.

The cross-examination of the last witness, M'r's Cox, is here resumed:

Int. Do you know what the terms of sale were when the property was sold by you to Holden, Ford, and King?

A. For one to ten years, at six per cent. interest, to be paid yearly.

Int. Did you agree to release any of the property upon payment of a part of the principal?

(Objected to by M'r Pike because the answer appears by the deed, and this is the best evidence.)

A. The evidence appears by the contract.

Int. By what contract does this appear?

A. The deed of sale, I presume.

Int. Do you recollect that the deed refers to any such contract?

A. I don't recollect anything about it; I never saw the deed until long after, and if I had read it I should not have understood it, as it was left entirely to the lawyers to arrange the business.

Int. Do you refer to any other contract than the deed of sale?

A. I do not.

Int. Then how do you know that this appears by the deed of sale?

(Objected to by M'r Pike on the ground that the deed of sale is exhibited with the bill.)

129 A. In no other way than as General Pike has represented it so.

Int. Did you, when the release spoken of by you in your direct examination as having been first drawn by M'r McPherson, and which you could not find, give your assent to the execution of the same?

A. When M'r McPherson first spoke to me about it, I told him I would prefer keeping the houses. He said I had agreed to take deferred notes, well secured, and upon his representing to me that it was a perfectly safe business transaction, I agreed to sign the release, having the fullest confidence that I should be amply secured.

Int. Why did you take the release to your house?

A. M'r McPherson requested me to do so: to read it, I presume.

Redirect by Gen. Pike:

Int. You have been asked in cross-examination whether you ever made a separate promise of compensation to M'r McPherson for services in the Angus & Lewis case; do you wish to explain your answer?

A. I do. I went down to M'r Carlisle's office, as I frequently did, to have a little conversation, and on my way I met, I think, M'r Bayliss. He asked me what prospect there was of my recovering that property. I said I thought a good one. He said "If you do, I think you might get $50,000 or $60,000 for it," as at that time property was very high. Talking in the office with M'r Carlisle and M'r McPherson both, I repeated what M'r Buckner Bayliss had said, and remarked to them just as I was coming out of the door, "Would it not be grand—$60,000! Why I could afford to give you both $2,500," in a laughing, joking manner. I stepped down and left the office. I supposed they perfectly understood it, for I certainly meant nothing. I meant that I would give these gentlemen each $2,500.

130 Re-cross, by M'r Appleby:

Int. About what time was this last conversation?

A. It was a time when property was very high; it was when my suit against Angus & Lewis was going on; I can't specify the month or week; it was the year my suit was commenced: I think in 1869 or 1870.

Int. Do you know of anything further material to this case under the issues in this case, or that may be of benefit or advantage to either party?

A. I don't suppose I do.

MARY A. COX.

Sworn to and subscribed before me this 12th day of May, 1874.

T. D. ANDERSON,
Examiner in Chancery.

OCTOBER 29, 1874.

Met by agreement of counsel to take testimony for the complainant. Present, General Albert Pike, complainant's solicitor.

Deposition of Walter S. Cox.

Whereupon, WALTER S. COX, a witness of lawful age, a resident of Washington City, produced, sworn, and examined by and for the complainant, deposes and says as follows, to wit:

I was spoken to by M'r McPherson, at what date I cannot now recollect, about the case of M'r's Cox against Angus & Lewis. He met me in court and said that he wished me to join him in the case. My impression is that he added either that M'r's Cox desired it or that she

authorized it. It was then in the equity court; but subsequently
131 M'r McPherson and myself argued it both at special and general terms on final hearing against Mess'rs Merrick and Moore. I believe I also appeared with him (McPherson) in the common-law suit for rents, which was not tried. This was after the equity suit ended. M'r Carlisle appeared in neither of the cases; in fact did not practice in that court, or never has. M'r McPherson never made any remark to me about my compensation, or I to him, until long after the case was decided, and I had forgotten all about it. Some one was jesting with me in his presence about my carelessness in charging and collecting fees, and he laughed and said, "I suppose you don't know that there is $1,000 coming to you from the case of Cox and Angus & Lewis?" This was the first time the subject was ever mentioned, and I afterwards understood him to say that M'r's Cox said she expected to pay me $1,000. Some time ago, in the summer of 1873, I think in the month of September, I wrote a note to M'r's Cox on the subject, and afterwards saw her. See claimed that Mess'rs Carlisle & McPherson were to pay my compensation out of their own fees.

WALTER S. COX.

Sworn to and subscribed before me this 29th day of October, 1874.

T. D. ANDERSON.
Ex. in Ch'cy.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, T. D. Anderson, examiner in chancery, do hereby certify that, in pursuance of agreement, the foregoing deposition was taken down and by me reduced to writing in the presence of, and from the statement of, the witness at the time and place designated in the caption thereof,
132 and was then and there by me read over to the witness, and by him subscribed in my presence and in the presence of counsel for both parties, who were then and there attending. The witness, having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, touching the matters at issue in said cause.

I further certify that I am not of counsel for any of the parties to said cause, or in any manner interested therein.

T. D. ANDERSON,
Ex. in Ch'cy.

In the supreme court of the District of Columbia. In equity.

MARY A. COX
vs.
JNO. D. McPHERSON. } No. 3268. Doc. 12.

For defendant.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Be it remembered that at an examination of the witnesses begun and held on the 6th day of June, A. D. 1874, and continued from time to time by , until the day of , A. D. 187 , when the within depositions were taken, I, T. D. Anderson, an examiner in chancery, did cause to be personally present at the office of Carlisle & McPherson, in the city of Washington, in said District, the within-named witnesses, to testify on the part and behalf of the defendant in a certain cause

now depending in the supreme court of the District of Columbia wherein Mary A. Cox is the complainant, and John D. McPherson the defendant.

T. D. ANDERSON,
Examiner in Chancery.

133 JUNE 6, '74.

Met pursuant to agreement of counsel to take testimony for the defendant.

Present, counsel for both parties.

Deposition of James T. Pike.

Whereupon, JAMES T. PIKE, a witness of lawful age, a resident of Washington City, produced, sworn, and examined, by and for the defendant, deposes and says as follows, to wit:

I have been a witness in this case before.

Int. Please state in which of the two office-rooms, occupied by John D. McPherson, you executed the promissory notes made by you in favor of Holden & Ford, and as to which you have heretofore testified.

A. In the front room.

Int. In which of the two rooms referred to were the said notes endorsed by Holden & Ford?

A. To the best of my recollection, in the same room and at the same desk where I affixed my signature.

Cross-examination waived.

JAMES T. PIKE.

Sworn to and subscribed before me this 6th day of June, 1874.

T. D. ANDERSON,
Examiner in Chancery.

Adjourned to June 8th, '74, at 1 p. m.

ANDERSON,
Examiner.

134 JUNE 8TH, '74.

Met pursuant to adjournment.

Present, counsel for both parties.

Deposition of C. Storrs.

Whereupon, C. STORRS, a witness of lawful age, a resident of Washington City, produced, sworn, and examined by and for the defendant, deposes and says as follows, to wit:

I know the parties to this suit.

Int. Please state whether you were in M'r McPherson's law offices on or about January 5, '72.

A. I was.

Int. Who else were there at that time?

A. M'r Samuel Ford, M'r Charles Holden, M'r McPherson, M'r Benedict, M'r Pike, and M'r's Cox; I don't remember of any other persons.

Int. State briefly the object of their assembling there.

A. The object was to make some payment to M'r's Cox. At the request of M'r Holden, I had borrowed some money on real estate paper furnished by M'r Holden, and was requested by him to bring it here, and retain it until directed to deliver it. I held this money, and paid it over on the direction of Mess'rs Holden & Ford. There were certain

notes in blank which I filled; they were signed by M'r James T. Pike, and endorsed by Mess'rs Holden & Ford. When they were so signed and endorsed, I laid the money on the table, in the front office, where these notes were lying.

Int. In what office-room was the table situated on which you laid the money, and at which these notes were signed and endorsed?

A. In the front room of M'r McPherson's offices.

135 Int. About how long were you there?

A. I should think from between 12 and 1 until 4 o'clock: I think we were there two hours and a half.

Cross-examination by M'r Pike:

Cross-int. Were there not some negotiations carried on in the back rooms of said offices relative to the business of which you had assembled to consummate? If yea, state if you were present at those negotiations, what they were, and in what they resulted; also, who were present thereat.

A. M'r Holden and M'r Ford were endeavoring to arrange some matters relative to the business for which we had assembled. Sometimes they were in the front room and sometimes in the back room; I was not a party to those matters. When the money was paid, I deducted the commissions, and that was all I had to do with it; beyond the matter of deducting the commissions and paying the money, I was not a party. I can only state that I know only in a general way what those negotiations were; I do not know the details; I was in the back room most of the time. My recollection is that most of the conversation took place in the front room. Mess'rs Holden & Ford were the persons present, principally; I think M'r Benedict was also present, part of the time; I have no personal knowledge of what they were endeavoring to come at.

Int. Were you present at the execution of the notes by M'r James T. Pike, and of their endorsement by Holden and Ford?

A. I think I saw them signed and endorsed.

Int. In which room were they so signed and endorsed?

A. In the front room.

Int. Were they so signed and endorsed before or after the negotiations were had in the back room?

136 A. I think it was after the commencement of the conversation which was a long one. They had reached, I suppose, some conclusion or something satisfactory to them when they requested me to fill the notes. I don't wish to be understood as saying I have personal knowledge of their conversation or transactions, but was requested to fill the notes.

Int. Do you mean by the expression "fill the notes" that they were written off by you for the signatures of the persons who were to execute and endorse them?

A. They were printed blanks and I filled in the dates and the amounts.

Int. Was M'r's Cox at the office when you arrived there?

A. She was not.

Int. How long afterwards was it when she arrived?

A. I am unable to state the exact time; she was sent for pretty soon after we came here by M'r McPherson. It might have been an hour or an hour and a half. I would not undertake to state the exact time.

Int. Did you have any conversation with her at that time?

A. Nothing in relation to the business; I merely spoke to her.

Redirect by M'r Appleby:

Int. Did Holden and Ford endorse the notes before the negotiation was concluded?

A. So far as I have knowledge of it, I should say not. That is my impression.

Int. Did you pay over the money before the negotiation was concluded?

A. I paid it when I was directed to. I suppose the negotiation was concluded. I counted the money in the back room and laid it on the table in the front room. I don't know who took it from the table. I think the amount was $4,200.

137 Int. Who was present in the front room when you put it on the table?

A. My recollection is that all the persons I have named as being present were in the front room. This includes M'r's Cox. M'r McPherson was anxious to close his office. He said, "Gentleman, you must bring this matter to a close, as I must go home."

Recross.:

In think this remark was made by M'r McPherson just before the business was closed up, between three and four. As an explanation to that, it might be stated that M'r McPherson stated he wished to leave on the train on a certain hour, then drawing near. I think the remark was made about a half hour before we left the office.

C. STORRS.

Sworn to and subscribed this 8th day of June, 1874, before me.

T. D. ANDERSON,
Ex. in Ch'y.

JUNE 8, 1874.

Deposition of James T. Benedict.

JAMES T. BENEDICT, a witness of lawful age, a resident of Washington City, produced, sworn, and examined by and for the defendant, deposes and says as follows, to wit:

I am the same person who has testified in this case before, at instance of complainant.

Int. Where were the notes executed by Pike and endorse by Holden & Ford, of which you have heretofore testified. I mean in which room of M'r McPherson's offices?

138 A. In the first room.

Int. Was it done before or after the conversation in the back room between Holden and Ford touching the discount?

A. After.

Int. Do you know what that conversation between Holden and Ford was?

A. Only from what M'r Holden told me.

Int. You have heretofore spoken about these notes of Pike's being laid on the table in a series; please state in what room these notes were placed in a series on a table?

A. In the front room of M'r McPherson's office in which they were drawn.

Int. Was M'r's Cox present when Pike executed these notes, when Holden & Ford endorsed them, and when they were so laid on the table?

A. She was present, but I don't know in which room.

Int. In which room did M'r Storrs pay over the money?

A. In the front room.

Int. In which room was M'r's Cox when the money was paid over?

A. According to the best of my recollection, M'r's Cox was sitting on the sofa in the front room.

Int. Where were you most of that evening?

A. In the front room.

Int. Were you at M'r McPherson's offices when M'r's Cox came: if so, in what room?

A. I was; I was in the front room.

Int. Were you in the back room at all; if so, how long, and for what purpose?

A. I was there for a short time; I went in to notify M'r Holden that he and M'r Ford must settle the matter, as I had waited as long as I could. Soon after that M'r Holden told me the matter was settled and to go on and fix the notes, and we did so.

139 Cross-examination is waived.

JAMES F. BENEDICT.

Sworn to and subscribed before me this 8th day of June, 1874.

T. D. ANDERSON,
Ex. in Ch'ry.

Deposition of Samuel Ford.

JUNE 8, 1874.

SAMUEL FORD, a witness of lawful age, a resident of Washington City, produced, sworn, and examined by and for the defendant, deposes and says as follows, to wit:

I am the same witness who has testified heretofore in this cause at instance of complainant.

Int. State in which of the two rooms, occupied by M'r McPherson for law offices, did the transaction of signing the notes and endorsing the same and paying over the money for the same, as to which you testified, take place?

A. In the front office.

Int. How much money, on that occasion, did you pay to M'r McPherson?

A. My memorandum book for 1872 shows that I paid $3,307.73 to M'r's Cox, and I paid Pike for stamps $40, and McPherson $13. I had previously paid M'r's Cox $1,000 on account.

Cross-examination waived.

SAMUEL FORD.

Sworn to and subscribed before me this 8th day of June, 1874.

T. D. ANDERSON,
Ex. in Ch'ry.

Adjourned to June 11, 1873, at 10 o'clock a m.

ANDERSON, *Ex.*

140 *Deposition of James M. Carlisle.*

JUNE 11, 1874.

Met pursuant to adjournment.

Present, counsel for both parties.

J. M. CARLISLE, a witness of lawful age, a resident of Washington City, produced, sworn, and examined by and for the defendant, deposes and says as follows, to wit:

Int. Have you heard read by the examiner the account of an interview between you and M'r's Cox, given by her on pages 3 and 4 in her

deposition taken before Examiner Anderson in this case? If so, state whether that account is correct, or whether it brings to your mind any particular not mentioned in your deposition in this case.

A. The examiner has just read to me that testimony, and I have listened attentively to the same. The account therein given of the supposed interview with M'r's Cox is not correct, nor does it bring to my memory any particulars not mentioned in my deposition already given in this case. I have revolved the whole subject in my mind with all possible care and anxiety, and deliberat-ly and now solemnly re-affirm my said former deposition in this case.

J. M. CARLISLE.

Sworn to and subscribed before me this 11th day of June, 1874.

T. D. ANDERSON,
Ex. in Ch'ry.

Deposition of John D. McPherson.

JUNE 11, 1874.

JOHN D. MCPHERSON, a witness of lawful age, a resident of Washington City, produced, sworn, and examined by and for the defendant, deposes and says as follows, to wit:

141 I am the defendant in this case. In the year 1867, about the beginning of September, M'r's Mary A. Cox came to the office and desired to see M'r Carlisle, and remarked to me that it was upon business which I would hear of, or words to that effect. She had to wait a short time before seeing M'r Carlisle, and then went into his office. I left her there, and did not again see her or M'r Carlisle that day. I did not go into his office, and knew at that time nothing of the subject of their interview. On the following morning M'r Carlisle and myself had in his office a long consultation about some matter of difficulty and consequence. What it was I do not remember.

When it was over, finding he did not mention the subject of M'r's Cox's visit, respecting which my curiosity had been a little excited, I asked him what was the business which she had with him. He replied by telling me in very brief terms that she had contracted to sell some property which had greatly increased in value, and wished to recover it, supposing that the contract had been violated by the vendees, and desired to employ us for a contingent fee of $5,000; and he would consult with me and read the papers on some other occasion. Seeing that he was much preoccupied with other matters, I merely said that whatever he thought proper to do I would join him in doing. Soon after this, perhaps the next morning, M'r's Cox came to my office and into the back room where I sat. She asked me if M'r Carlisle had spoken to me about her business. I told her that he had merely mentioned it to me. She then sat down at my desk and told me the particulars of her contract with Angus & Lewis, and the proposition she had made to M'r Carlisle, naming the fee which she had offered him, $5,000, and that he would undertake the case if I was willing. After a while she went into M'r Carlisle's office, and I went with her or followed her in a few moments.

We there talked the matter over fully, and, I think, read the lease
142 which she had previously left with him.

In the course of the conversation, we accepted the engagement upon the terms she had offered, which were then restated. The amount of the fee was subsequently mentioned by M'r's Cox to me in this way: She was exceedingly anxious that M'r Carlisle should try her case in the supreme court of the District, and wished me to endeavour to persuade him to do so, and spoke of the amount of the fee, $5,000, as a

matter which ought to induce us to use every endeavour to earn it, and as a good compensation for such labor. The amount of the fee was again spoken of between M'r's Cox and myself on the occasion of my bringing suit for the mesne profits, No. 8713, at law. I had an idea that counsel-fees could be recovered. I contemplated putting the amount in as special damages. I spoke to her about that, and we again had occasion to name the amount, and thought of putting in an item of $6,000 for counsel-fees and expenses. Whether it was put in I do not remember. I called this morning to see the papers, but they were not on file, and I did not pursue the search. A large portion of our business has been transacted for contingent fees, and I believe I am thoroughly familiar with the rates of such fees among the profession. Where there is no retainer, and where the case is a doubtful one, twenty-five per cent. is considered, and is only a fair compensation. In this case M'r's Cox thought the property was worth $40,000, and having contracted to sell it for $15,000, she expected to make $25,000 by breaking the contract. For myself, I considered the case extremely doubtful, although the contract was in form a lease with the privilege of purchase, at the expiration thereof, provided the lessees should have performed all their covenants; yet in truth, it was a contract of sale, and if the lessees had thought proper to hold on to the property until the termination of the lease, and then filed a bill for specific performance, I thought, and still think, they could have compelled the conveyance.

143 The only thing in which they had failed was in not having improved the property to the amount of $5,000 within the first two years of the lease, and it was upon this ground that M'r's Cox thought that they had forfeited the lease and could be ejected. This, however, by the terms of the contract, was not the case. The only forfeiture for which they could be ejected was the failure to pay taxes. No such cause of forfeiture had occurred when we were consulted in the case, nor was it at all certain that it ever would occur, so that we had the prospect, when we took the case, of having to wait until the termination of the lease, more than seven years, before we could recover the property and realize our fee. The only thing we could do we did, giving notice to Angus & Lewis that, as they had failed to put up the improvements within the time specified, their right of purchase was gone. This notice was given on the 12th of September, 1867; the original was filed in equity, cause No. 1519, and is in the handwriting of a student in our office, M'r Williams, and is signed by Mary A. and Jane P. Cox. It was drafted by M'r Carlisle in person, or under his immediate supervision. Some time after, Angus & Lewis neglected to pay the taxes. I understood that the cause of their failure was the uncertainty of their title produced by the notice just referred to.

Upon this failure, as a cause of forfeiture, we commenced ejectment on the 8th of September, 1868, and prosecuted the same to judgment and obtained possession. The number of this cause is 5037 at law. Angus & Lewis filed a bill in equity to enjoin the suit and for other relief, but in this were defeated. I subsequently brought suit at law to recover for use and occupation from the 1st of July, 1867, to August 31, 1868. This suit was numbered 6299 at law. That service was not included in contract for the recovery of the property, as M'r's Cox in her testimony supposes, because nothing was due her from Angus & Lewis when

144 that contract with us was made, nor was it contemplated that they would fail to pay the rent. I am very sure that M'r's Cox made oath to the correctness of her account upon which that suit was

brought, and that her affidavit will be found filed with the suit, and, if so, I ask leave to append a copy of it to my testimony.

The defendants pleaded the continued existence of the contract as a bar to our recovery for use and occupation, and thus endeavored to reopen the question of forfeiture, but ultimately abandoned that ground and submitted to judgment. In regard to the notes which M'r's Cox took from Holden & Ford, I have to say this: I think M'r Holden first came to me, stating that he had been referred to me by M'r's Cox; he said that he and Ford had negotiated a sale of five houses to M'r James T. Pike, and wanted M'r's Cox to release the lien which she had upon the said houses which stood upon square 312. I told him I must hear from M'r's Cox. Soon afterwards she came to see me and told me what her wishes were in regard to terms; what they were I do not now remember. I am sure it was suggested at one time that she should take all the notes, which constitute the first and only lien upon the property; but she wanted some cash, and very properly refused to submit to the discount which the sale of the notes would involve. Holden then undertook to sell some of the notes and raise the $2,000 which M'r's Cox demanded. He was a very long time about it. He appointed several meetings at my office, but failed to bring the money, and on all those occasions M'r's Cox was sent for, and came unless I sent her word in advance that the appointment was countermanded. Finally, we met and consummated the arrangement as other witnesses have stated. I believed then, and believe now, that M'r's Cox knew and understood every item of the arrangement. When it was finally consummated, she sat, as she in her testimony says, in a chair near the table at which I sat.

115 That table was a large one, occupied during the day by two young gentlemen of our office. The chair which she occupied was alongside of this table and had its back to the wall, about midway of the front office, which is about 22 feet 6 inches long and 11 feet 3 inches wide. At that table, according to my recollection, which is as clear upon this point as almost any event of my life, the notes were drawn and signed. I observe that one witness says they were taken to another table to be endorsed; if so, that table stood then where it now stands, on the other side of the room of the front office and immediately opposite the seat which M'r's Cox occupied.

I saw the notes drawn, signed, endorsed, passed, and the whole of it took place within eight feet of where M'r's Cox was sitting. Whether she sat in that seat the whole time, without being absent from it a moment, I do not recollect; but I do not now recollect that either she or I moved from the table after we had once taken our seats there, although I may have given up my seat when the notes were signed. There was room at the table for more than one person. It was quite late in the evening, or rather it was considerably after dark, when the matter was concluded, and I lost my passage home by the train I usually take. In the whole matter I conscienciously and faithfully performed my duty and carried out her wishes as I understood them. I have heard M'r's Cox's testimony as to her subsequent interview with me about the notes when she says she discovered she had not the two-year notes. No such interview ever occurred—I mean no such question and answer as she says constituted that interview. As to the insurance upon the houses, I have to say that one was insured in the Phœnix Company of Hartford, Connecticut, one in the North American of Philadelphia, and one in the Andes. The two first companies, I am informed by M'r Pratt, the insurance agent, did not fail on account of the Chicago fire, or any other casualty, but are still doing business with unimpaired credit. The

146 Andes Company continued to do business until the month of January following the fire, which took place in October, 1871, and finding itself crippled, offered its policy-holders who desired it either to return the premiums for the unexpired time or to transfer the policy into another company.

These particulars I derived from Mr Pratt, who was the agent of the companies who issued the policies above referred to. If these were not the policies that Mr's Cox got from me, I have noidea what policies s he ever did get. She certainly got from me the policies of insurance upon those houses. The policies above referred to were issued, one in November, 1871, and two in October, 1871; they had, I think, at least one year to run. Nobody ever placed in my hands one dollar to effect any further insurance, nor ever called upon me to perform any other duty in the premises.

With regard to the bond of Holden, Ford, and King, it was delivered by them, or some one for them, at the time Mr's Cox's deed was delivered, and she was present. I do remember distinctly and with certainty that she directed me to take it, and in her presence I did so. On one occasion Mr's Cox called upon me to show her some of her papers. I don't remember what they were; they were usually kept in the iron safe, but after being used were sometimes placed in a pigeon-hole under the letter "C," as the safe was hard to open. On this occasion I expected to find them in the pigeon-hole; not finding them readily, I asked Mr's Cox if she had taken them. She said "No," and added, "Do you think I would take any of those papers without your knowledge?" I said I supposed she might possibly have taken it temporarily to look at. She said, certainly not; that she would not think of taking any of those papers without my consent. She added some words, which I do not now remember distinctly, acknowledging that she had no right to take them.

147 I think she said that she considered them ours, ("yours,") meaning Carlisle & McPherson's. Whether this incident occurred before or after I had the bond I cannot say, but in all my intercourse with her upon the subject of the sale of the square, and the papers in regard to it, I felt satisfied that she recognized and admitted our interest in the proceeds and in the papers which secured them; and when I took the bond above mentioned, I did it with the belief that we had a right to hold it under our contract as security for our fees, and we do hold and insist upon holding it still.

The notes of Pike which Mr's Cox holds I think are amply secured, but the houses are in litigation and unoccupied; and if she suffers the arrears of taxes and interest to accumulate without enforcing her lien, the debt will certainly before long exceed the cash value of the houses.

With regard to my direction to Ford not to pay his interest on the bond given for the purchase of square 312, I say that the notice was given and countermanded before this suit was commenced or before I ever had any idea it was to be commenced.

Adjourned to June 13 at 12 m.

ANDERSON, *Ex.*

JUNE 13, 1874.

Met pursuant to adjournment.

Present, counsel for both parties.

Whereupon the deposition of the last witness, John D. McPherson, is resumed: I do not wish to be understood as testifying that when I took the bond in Mr's Cox's presence, and with her consent and by her direction, she had any specific idea in her mind as to our having a lien

upon it for our fee, or that any idea of our fee occurred to her in that connection; but I do mean to say that she regarded us as the proper custodians of that paper until our business with her as her counsel and attorneys should be settled; and that had the question then been
148 raised, she would not have contested our right to hold it. This is the distinct impression left upon my mind by the facts which occurred at the delivery of that paper.

Before testifying on this point, I wished to see my answer on this subject to the supplemental bill, but my answer is missing from the files, and cannot at this moment be found. It was drawn by M'r Appleby, my counsel, and I do not remember in what terms. Whatever they be, I wish to qualify them by this testimony if they differ from it.

(Complainant's counsel objects to that portion of the defendant's testimony that refers to the litigation between M'r's Cox and Angus & Lewis, the professional services that were rendered by Carlisle & McPherson in M'r's Cox's behalf in that litigation, as the same is found on pages 7, 8, 9, 10, and 11 of his defendant's testimony, and for cause of this objection assigns that such testimony is in its nature secondary, and is offered whilst the primary and better evidence of the facts testified to, namely, the records of the court in which said litigation was had, is in existence and is not offered.)

Cross-examination by M'r Pike:

Int. Are you positively certain that M'r's Cox was present when the notes were signed and endorsed as mentioned by you on page 14 of your direct testimony?

A. I am as certain as I can be of anything which depends upon my memory after a lapse of two years; I have no doubt of it whatever.

Int. Were not the insurance-policies referred to on pages 15, 16, and 17 of your direct testimony what are familiarly known as builder's risks, with which M'r's Cox had no connection or interest?

A. They were builder's-risk policies, I believe, because the
149 houses were not finished. I understand a builder's-risk policy to be an insurance upon a building, with the privilege of completing it or working upon it; but the policies were good for a year each, and would remain in force after the house was finished; the policies were made October 4, 1871; October 19, 1871, and November 16, 1871, as I am informed by a memorandum from M'r Pratt's office, and were all in force when the sale to Pike was made.

Int. Will you, in this connection, please give the date of the sale to Pike?

A. It was early in January, 1872; but the day I do not remember.

Int. You have given the dates on which the policies were executed and from which they had force and effect. How long, by their terms, were they to be of force and effect?

A. The memorandum from M'r Pratt's office to which I refer does not state the time, but states that two of the policies were cancelled on the 17th of May, 1872, and that the third has expired. My impression is that the policies run for a year, but I do not know how I got the impression; they may not have been for such a length of time. I do not remember to have read them when I had them.

Int. Did not M'r's Cox at one time place in your hands those policies, and at the same time call your attention to the importance of keeping houses insured?

A. I do not think that M'r's Cox placed them in my hands. I thought they came to me from Holden & Ford, but she may have brought them

to me. I do not remember who brought them. She did speak of the importance of keeping the houses insured. I was anxious upon the subject, but she spoke of it as a duty to be performed by the owners of the houses, and not by her or me, and when she spoke to me on that subject, the houses were under insurance, and her anxiety was about the solvency of the companies.

150 Int. Have you ever taken any action to see or cause the owners to perform their duty to keep those houses insured?

A. I have not personally done so, nor done anything in the matter since I delivered the policies to M'r's Cox.

Int. Did you not, on more occasions than one, notify M'r Samuel Ford not to pay to M'r's Cox this interest on the bond given for the purchase of square 312?

A. I notified him on one occasion, and on another occasion reminded him that I had given him such a notice.

Int. What caused you to give such notice and reminder?

A. I gave the reminder because I wished the notice to be observed. I gave the notice because I wished any money which he was ready to pay to M'r's Cox to be applied, in whole or in part, to the payment of our fee. The notice, however, was not confined to the interest, but was simply a notice to pay nothing to M'r's Cox.

Int. Did you, at the time you countermanded that notice, or have you since, requested M'r Ford to pay to M'r's Cox his interest due and as the same should become due?

A. When I countermanded this notice, I did it by request of M'r Ford to go on and pay his interest. I think that was the form of my command. I did not make that request in the formal terms embodied in the question; my object was simply to release him from the prohibition of my notice.

Int. Have you, at any time since that notice was countermanded, positively given M'r Ford to understand that it is your desire that he should pay to M'r's Cox such interest?

A. I don't think I have ever mentioned the subject to him since.

Int. Is not M'r Ford now, and for some time past has he not been, your client?

A. He is, and has been for some short time.

JOHN D. McPHERSON.

151 Sworn to and subscribed before me this 13th day of June, 1874.

T. D. ANDERSON,
Examiner in Chancery.

Adjourned to June 20, 1874, at 1 o'clock p. m.

ANDERSON,
Examiner.

EX. J. M.

In the supreme court of the District of Columbia, this 4th day of November, 1869.

MARY A. COX, JANE P. COX, PLAINTIFFS,
against
THOMAS LEWIS AND JOB W. ANGUS, DEFENDANTS. } At law, No. .

The plaintiffs sue the defendants for money payable by the defendants to the plaintiffs. For that the plaintiffs let to the defendants a

parcel of land in Washington City, in the District of Columbia, known as square numbered three hundred and twelve, to hold from the first (1st) day of October, A. D. eighteen hundred and sixty-four, (1864,) at nine hundred dollars a year, payable quarterly, of which rent two quarters and eighteen days are due and unpaid, to wit, the rent due from the first day of July, eighteen hundred and sixty-seven, to the eighteenth day of January, eighteen hundred and sixty-eight, when said lease became forfeited and the term ceased.

And for that the defendants, by the plaintiffs' permission, had the use and occupation of the plaintiffs' land, to wit, the said square numbered three hundred and twelve, in Washington City, from January the eighteenth, A. D. eighteen hundred and sixty-eight, to August the thirty-first, eighteen hundred and sixty-eight, when their tenancy was terminated by notice to quit.

152 And the plaintiffs claim one thousand and fifty dollars, ($1,050,) with interest from the time when the same became due, and costs.

JNO. D. McPHERSON,
W. S. COX,
Attorneys for Plaintiffs.

* * * * * * *

Affidavit under 75th rule.

MARY A. COX AND JANE P. COX, PLAINTIFFS,
against
THOMAS LEWIS AND JOB W. ANGUS, DEFENDANTS. } At law, No. .

On this 4th day of November, A. D. 1869, personally came Mary A. Cox, one of the plaintiffs in the above-entitled cause, and being duly sworn, made oath for herself, and as agent for Jane P. Cox, the other plaintiff, that the cause of action in this cause is a demand of the plaintiffs against the defendants for rent due for and use and occupation of square three hundred and twelve, in the city of Washington, from July 1, 1867, to August 31, 1868, at $900 per annum; that they claim the sum of one thousand and fifty dollars for such rent, use, and occupation, and that the said sum is due them therefor, exclusive of all set-offs and just grounds of defence.

MARY A. COX.

Sworn and subscribed before me this 4th day of November, 1869.
R. J. MEIGS, *Clerk.*

153 *Pleas.*

In the supreme court of the District of Columbia, the 7th day of December, A. D. 1869.

MARY A. COX AND JANE P. COX, PLAINTIFFS,
vs.
THOMAS LEWIS AND JOB W. ANGUS. } At law, No. 6299.

1. For plea to the first count of the plaintiffs' declaration, the defendants say that they were always ready and willing to pay to the plaintiffs the rent for the said two quarters and eighteen days, to wit, the sum of $494.45, and that, before action brought, they tendered and offered to pay the same to them, but they, the said plaintiffs, refused to accept it,

and the defendants now bring the said $494.45 into court ready to be paid to the plaintiffs.

2. And for a plea to the second count of the plaintiffs' declaration, the defendants say that they never promised, and that they never were indebted, as alleged.

3. And for second plea to the second count of the plaintiffs' declaration, the defendants say that they hold the said parcel of land and premises under and by virtue of a written contract and lease, and that the same has not been forfeited nor terminated.

R. T. MERRICK,
Attorney for Defendants.

* * * * * * *

Affidavit to pleas.

* * * * * * *

154 *Fi. fa.*

In the supreme court of the District of Columbia, the 5th day of October, 1871.

MARY A. COX AND JANE P. COX, PLAINTIFFS,
vs.
THOMAS LEWIS AND JOB W. ANGUS, DEFENDANTS. } At law, No. 6299.

The President of the United States to the marshal of said District, greeting:

You are hereby commanded that of the goods and chattels, lands and tenements, of the defendants you cause to be made, $1,050 which the plaintiffs lately, in said court, in said suit, recovered of said defendants for debt, and the further sum of $23.20 for costs and charges about this suit expended, as appears of record, and return this writ into the clerk's office of said court within 60 days from the date hereof, so indorsed as to show when and how you have executed the same.

Witness:

D. K. CARTTER,
Chief-Justice of said Court.

McPherson.

(Endorsed:) Levied as per schedule, October 18, 1871, and satisfied plaintiffs' attorney. (See his receipt on back of writ.) A. Sharp, marshal. November 13, 1871.

Received of Alex. Sharp, U. S. marshal D. C., twelve hundred and seventy-six dollars and eighty-two cents in full of the within execution.

JNO. D. McPHERSON,
Attorney for Plaintiffs.

NOVEMBER 13, 1871.

155 DISTRICT OF COLUMBIA, *ss:*

I hereby certify the foregoing to be true copies of the original declaration, pleas, and writ of fieri facias and return, in said cause No. 6299, as the same appear on file in said cause.

Witness my hand and the seal of said court, June 18, 1874.

R. J. MEIGS, *Clerk.*
By JOB BARNARD,
Assistant Clerk.

Deposition of Frederick W. Pratt.

JUNE 20, 1874.

Met pursuant to adjournment.

Present, counsel for both parties.

Frederick W. Pratt, a witness of lawful age, a resident of Washington City, produced, sworn, and examined by and for the defendant, deposes and says as follows, to wit:

The houses upon lots 26, 27, and 28, in square 312, were insured in the office of A. S. Pratt & Son, of which firm I am a member, conducting a general insurance business. The building on lot 26 was insured by the Phœnix Comp'y, by a policy dated October 19, 1871, for $3,500, having one year to run. The building on lot 27 was insured by the Insurance Company of North America, of Philadelphia, October 4, 1871, for the same amount, and having one year to run. The building on lot 28 was insured in the Andes Insurance Company, of Cincinnati, on the 16th of November, 1871, for the same amount, having a year to run. All the policies were issued for a year, with the privilege of finishing, which is called a builder's risk, for which an additional premium was paid, the privilege expiring in one month from date of issue, re-
156 newable from month to month by payment of the same monthly premium. The Phœnix Company is a strong, reliable company; it paid its losses promptly in the great fires of Boston and Chicago, and is still doing business. The North American is the oldest stock company in the United States, and is strong and reliable, and has assets amounting to over $3,000,000. It is still doing business. The Andes Company paid all its losses and stopped doing business, re-insuring its risks in another company; the policy-holders were protected, not losing anything. The policies in the Phœnix and Andes were cancelled May 17, 1872. That in the North American ran to its full term.

FRED'K W. PRATT.

Sworn to and subscribed before me this 20th day of June, 1874.

T. D. ANDERSON,
Ex. in Ch'ry.

Cross-examination is waived.

Defendant here files the paper marked "J. M."

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, T. D. Anderson, examiner in chancery, do hereby certify that, in pursuance of agreement, the foregoing depositions were taken down and by me reduced to writing, in the presence of, and from the statement of, the witnesses, at the time and place designated in the caption thereof, and were then and there by me read over to the witnesses and by them subscribed in my presence and in the presence of counsel for both parties, who were then and there attending, the witnesses having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, touching the matters at issue in said cause.

157 I further certify that I am not of counsel for any of the parties to said cause, or in any manner interested therein.

T. D. ANDERSON,
Ex. in Ch'ry.

In the supreme court of the District of Columbia. In equity.

Cox
vs.
McPherson. } No. 3268. Doc. .

In rebuttal for defendant.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Be it remembered that at an examination of witnesses begun and held on the 4th day of January, A. D. 1875, when the within depositions were taken, I, T. D. Anderson, an examiner in chancery, did cause to be personally present at my office, in the city of Washington, in said District, the within-named witnesses, to testify on the part and behalf of the defendant in a certain cause now depending in the supreme court of the District of Columbia, wherein Mary A. Cox is the complainant and John D. McPherson is the defendant.

T. D. ANDERSON,
Ex. in Ch'ry.

JANUARY 4, '75.

Met by consent of counsel.
Present, counsel for both parties.
M'r J. D. McPherson, the defendant, is here recalled, and says:
The circumstances under which M'r Cox was employed are as follows:

158 After the suit in ejectment was brought M'r's Cox expressed to me a desire to have additional counsel with me, and consulted with me as to the person to be employed. I told her that if the ejectment case was to decide the contest, I should prefer M'r Riddle; but that if a bill should be filed in equity, as I supposed probable, to enjoin our proceedings at law, I should prefer M'r Cox; and it was understood she was to make that arrangement. Meeting M'r Riddle casually, some time after, on the east portico of the City Hall, I enquired of him whether M'r's Cox had been to see him. What his reply was I do not remember; but he either understood from me at that time, or had already understood, that M'r's Cox desired to see him about her case. A considerable time, I think, elapsed before it became necessary to determine the question of employment of counsel, and after the bill was filed I told 's Cox it was now time to retain counsel, and we spoke again about M'r Riddle. She said she had only intimated to him that she might want his services, and was in no way committed to retain him. I then told her she had better see M'r Cox, as I wanted to confer with him immediately. She made some excuse; I don't know what it was; something, however, respecting her own engagements, and desired me to engage him and to consult with him. I did so at once. I said nothing to him about the amount of fee, leaving that to be settled by M'r's Cox. She certainly did afterwards mention to me the sum of $1,000 as the amount of M'r Cox's fee. I always supposed, until informed to the contrary by M'r Cox, that she had seen him after my first interview with him; but this is a mere impression, and I do not know whence I derived it.

There was no agreement whatever between M'r's Cox and myself, or M'r Cox and myself, that we were to pay M'r Cox's fee, nor was the

idea ever suggested before the employment of M'r Cox that Carlisle & McPherson should pay his fee. After the case was won M'r's Cox told me more than once that we ought to pay M'r Cox's fee out of
159 our $5,000, and it was on this occasion, among others, that the amount of his fee was mentioned. I denied the reasonableness of this, as the employment of additional counsel was her own arrangement and proposition, without any suggestion from either of us as to the necessity of it. The amount of his fee was also spoken of between me and M'r's Cox when I brought the suit for mesne profits against Angus & Lewis, and the question arose whether it could be claimed as part of the damages, inasmuch as he was not in the ejectment suit, if I remember right—that or some other reason rendering it doubtful. The papers in the case I cannot find; they have been taken from the files of the court; but to the best of my recollection the fee due Cox was included in the damage, in addition to the fee of $5,000 due to Carlisle & McPherson.

I produce and file a letter I received from M'r's Cox in regard to the settlement with Holden & Ford while their sale to James T. Pike was pending. This letter I have found since giving my testimony, and I was not aware of its existence until I came across it accidentally. The letter is filed and marked "A."

Cross-examination is waived by M'r Pike.

JOHN D. McPHERSON.

Sworn to and subscribed before me this 4th day of January, 1875.

T. D. ANDERSON,
Ex. in Ch'ry.

EXHIBIT A.

Col. Holden has just left, and tells me you approve and think perfectly safe his offer to pay, in addition to his interest, $2,300, $2,000 cash and all expenses for papers necessary to all parties, taxes, insurance, &c.
160 If such is your understanding of the matter, I am willing to affix my name if I am perfectly safe and secure, of which you and M'r M. C. must be the judge. I am too unwell to see you personally.

Yours truly, M'R'S COX.

Friday morning.

(Endorsed:) For Carlisle & McPherson.

Deposition of A. G. Riddle.

JANUARY 4, 1875.

A. G. Riddle, a witness of lawful age, a resident of Washington City, produced, sworn and examined by and for the defendant, deposes and says as follows, to wit:

It is impossible for me to fix the time of my employment in the case of Cox vs. Angus & Lewis, at law; whether I was first spoken to by M'r McPherson, counsel for the plaintiff, or by M'r's Cox, the plaintiff, in the first instance, I cannot tell. My impression is that I was first spoken to by M'r McPherson, who asked me if I was willing to be associated with him for the plaintiff in that case, and I stated that I was; he saying further that if I was, M'r's Cox would call upon me and make some arrangement with me to become her counsel in the case. Some time after that, as I now remember, M'r's Cox did call and asked me if M'r McPherson had spoken to me about being engaged in that case. I presume I said to her that I had expressed a willingness to him to be

associated with him in the case. She said she wished to have me appear in the case with him and that his speaking to me was all right. There was something said between us about fees and about my being paid a retainer; she said she was not then in funds, but she would probably be able to pay me, I think, about $100 at some time before the trial. I think that was all that occurred between us, and I do not think
161 I have seen her since, nor do I think I would know the lady were I to see her now. I think a few days after that, M'r McPherson asked me if M'r's Cox had seen me, to which I replied she had, and that it was all right. I supposed that I was in the case until subsequently I saw the name of Walter S. Cox printed with that of M'r McPherson; and then of course I paid no further attention to the case; I did nothing and was paid nothing.

Cross-examination waived by M'r Pike.

A. G. RIDDLE.

Sworn to and subscribed before me this 4th day of January, 1875.

T. D. ANDERSON,
Ex. in Ch'y.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, T. D. Anderson, examiner in chancery, do hereby certify that, in pursuance of agreement, the foregoing depositions were taken down and by me reduced in writing, in the presence of and from the statement of the witnesses at the time and place designated in the caption thereof, and were then and there by me read over to the witnesses and by them subscribed in my presence and the presence of counsel for both parties, who were then and there attending; the witnesses having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, touching the matters at issue in said cause.

I further certify that I am not of counsel for any of the parties to said cause, or in any manner interested therein.

T. D. ANDERSON,
Ex. in Ch'y.

162 *Exhibits.*

A 1.

WASHINGTON, D. C.,
November 23, 1872.

DEAR M'R'S COX: I have your note and the deed. I will consult M'r Carlisle, and give you an answer, as to your powers in the premises, early next week.

The suit against Lewis & Angus is suspended for compromise. They offer $1,250; I insist on $1,500. I hope they will come to an agreement in a few days.

In connection with the troubles under which you labor, there is one matter which gives M'r Carlisle and myself some anxiety.

We have nothing in writing from you, that I now remember, showing terms of our agreement respecting the square recovered from Angus & Lewis, out of which we were to have five thousand dollars. Should this not be paid in your life time, and should you die without giving us full and express evidence of the agreement, we will have to depend on George and Miss Jane for payment: a situation which would be very unpleasant—I need not say how unpleasant.

Will you not, therefore, have the goodness to give us a writing to the above effect, say in the terms of the one I enclose.

Respectfully,

JOHN D. McPHERSON.

163 A 2.

There is due to Mess'rs Carlisle & McPherson the sum of five thousand dollars ($5,000) for their services in the suit for the recovery of square numbered three hundred and twelve, in the city of Washington, from Lewis & Angus, the same being the contingent fee which, on their bringing the suit, I promise to pay them out of the proceeds of the property in controversy, when sold, if the same should be recovered from the lessees, and which is a lien upon the securities received for the proceeds.

A 3.

WASHINGTON CITY,
May 23, 1873.

Bank of Washington, pay to John D. McPherson, or order, balance in full, of borrowed money loaned to me, one hundred and forty dollars, ($140.)

MARY A. COX.

[Stamp.]

(Endorsed:) Jno. D. McPherson.

A 4.

NOV. 24TH, 1872.

DEAR M'R MCPHERSON: I cannot accede to your request. I never made such a promise. My offer to M'r Carlisle, to whom I first named the subject, was distinctly 2,500$, contingent fee for the recovery of 312, and he said he would speak to you. He did so in my presence. There was no dissent on your part, and the case was taken, and I never conceived there could be any departure from this understanding.

The fee of 2,500$ was considered large and liberal by those
164 who thoroughly understood the case; but that I offered neither one dollar more or less, and that I will honestly pay, but not one dollar more.

This I say with all due respect to M'r Carlisle and yourself. I think upon reflection you will find I am correct. I prefer to write rather than to encounter indifferent persons in your office. With much sincere regret that this request of yours cannot be acceded to,

I remain, as ever, your friend,

M. A. COX.

Once, twice, nay, I think thrice, I spoke of this 2,500 due M'r Carlisle and yourself for the recovery of 312, and can name both time and place, and the subjects that brought forth the conversation between us.—(Copy of letter sent to M'r McPherson.)

A 5.

WASHINGTON, *Nov. 25th*, 1872.

DEAR M'R'S COX: I have your note. I have not spoken yet about it to M'r Carlisle, who is not at this moment in his office. My recollection

is clear and distinct on this subject, and I can prove it to your satisfaction, or the satisfaction of any court, by yourself.

You will not think hard if we feel ourselves compelled to bring this matter to an issue at once, in the only way open to us.

Yours, with respect,

JNO. D. McPHERSON.

A 6.

Copy of my letter to M'r Carlisle.

DEAR M'R CARLISLE: Ask M'r McPherson for my reply to him
165 asking me to sign a paper acknowledging due to Mess'rs Carlisle & McPherson a fee of $5,000 in Angus & Lewis case. This morning he writes me word you were not in your office and did not see it, and says he can prove by my own words the claim, and threatening me with suit if I do not comply.

What I have written to him is the truth, the whole truth, and spoken of to him, to you, and many others.

I adhere to my letter and will not depart from it, and if you can sanction this threat you are certainly not the James M. Carlisle I have loved so dearly and trusted.

Your friend,

M. A. COX.

A 7 and A 9.

WASHINGTON, *March* 20, 1873.

M'r's MARY A. COX:

I beg your early attention to the payment of the fees in your cases against Lewis & Angus, and also to the balance of borrowed money due. M'r Carlisle informed me some time ago that he had a note from you on the subject of fees, and expected you would see him. He also told me that in the note you said the fee was only to be twenty-five hundred dollars, whereas he said that in fact it was to be five thousand dollars; that such was your own offer, and that you had never mentioned any other sum. Such was your statement to me also more than once, but it is needless for me to remind you of the occasions on which you made it. I observe, also, you have settled the case of Cox v. Angus. My fees are due in that also. You are, of course, aware how excessively disagreeable it would be to M'r Carlisle to have any controversy with you either as a witness or otherwise, and this fact is worth something to you in money, though not the amount you demand. If you are
prepared to offer payment, I will entertain the proposition for an
166 abatement, the more prompt the offer the more chance for abatement; but I assure you that it is simply M'r C.'s reluctance to appear against you that prevents me from having our controversy determined by the proper tribunal.

Very respectfully,

JNO. D. McPHERSON.

A, 8.

MARCH 20, 1873.

To Mess'rs CARLISLE & McPHERSON:

GENTLEMEN: In reply to your notes recently received calling my attention to your demands, I regret to see that your recollection is utterly at fault as to the fee promised in the Lewis and Angus case.

I distinctly remember the sum proposed, which was just half the amount you now claim, and was to be paid out of the proceeds of sales of the property as such proceeds shall be realized.

I am not insensible to the expressed "reluctance" of M'r Carlisle to appear in court against me in such an issue, while on the other hand I fully appreciate the readiness of M'r McPherson to place me in that position. The difference between the two gentlemen in this respect is not unworthy of observation. As to the "balance of borrowed money," I intend to pay it so soon as I can raise the funds, and shall continue to exert myself to accomplish this as early as possible; so, to', the amount that is justly due in the case of Cox vs. A. & Lewis, although I do not think I am aided by that; but I must protest against M'r McPherson advising my debtors not to pay me my honest dues until he has been consulted. I did suppose the law was to maintain justice and not to oppress widows nor obstruct the fulfilment of just obligations.

167 If, however, you gentlemen imagine that your rights are impaired by any fault of mine, much as I deprecate the necessity, I shall not shrink from the ordeal. Yet, as I do not wish to trespass on the time, much less to excite the ill-will, of those who, having begun by acting as my friends, threaten to end by becoming my persecutors, I will, very respectfully, close this letter.

M. A. COX.

A 10.

(Copy sent 30th April, 1873, to J. D. McPherson.)

M'r McPherson: You will oblige me by enclosing the "bond" you have in your possession belonging to me, and which was given by "Holden, Ford & King" for the sum of $38,000 to me for square 312.

Respectfully, your obedient servant,

MARY A. COX.

A 11.

307 D, 31 *Jan'y*, '71.

My Dear M'r's Cox: As I have no doubt you have kept (which I have not) a faithful account of some little advances I made you for taxes, &c., please look at it, and if it quite meets your wishes, send me two dozen of wine, such as you sold to Evarts and gave me, at your own price.

Very faithfully, your servant,

J. M. CARLISLE.

Mrs. M. A. Cox, *C street*

P. S.—I have to give a dinner: the judges, lawyers, and diplomaticks will know what is what.

168 EXHIBIT J. M. C., No. 1.

Original letters of complainant filed and exhibited by defendant with J. M. Carlisle's testimony, marked "J. M. C., No. 1," "J. M. C., No. 2," "J. M. C., No. 3," and "J. M. C., No. 4."

Dear M'r Carlisle: Ask M'r McPherson for my reply to him requesting me to sign a paper acknowledging 5,000 fee $ due the firm of Carlisle & McPherson in Angus and Lewis case.

This morning he writes me word you were not in your office and did not see it, and furthermore "can prove from my own words the claim, and threatening to bring suit if I do not comply.

Truly this is the "last feather on the camel's back," and if you sanction this threat you are not the James M. Carlisle I have loved so dearly and trusted so implicitly. What I have written to him is the truth, the whole truth, and I adhere to it and will not depart from it.

Sincerely, your friend,

M. A. COX.

Every friend I have can corroborate my statement.

Filed by the defendant this 10th day of Feb., 1874.

RICHARD L. WALLACH,
Examiner.

EXHIBIT J. M. C., No. 2.

DEAR M'R MCPHERSON: I cannot accede to your request. I never made such a promise.

My offer to Mr. Carlisle, to whom I first named the subject, was distinctly 2,500 contingent fee for the recovery of 312. He said he would speak to you. He did so in my presence. There was no dissent on
169 your part, and the case was taken, and never did I conceive or imagine there could be any departure from this understanding until I received your letter of Saturd' ev'ng.

The fee of 2,500$ was considered large and liberal by those who thoroughly understood the case; but that I offered, neither one dollar more or less, and that I will honestly pay, but not one dollar more. I think, upon reflection, you will find I am correct. I prefer to write rather than to encounter strangers in your office.

With much sincere regret that this request of yours cannot be acceded to, I remain, as ever, your sincere friend,

M. A. COX.

Once, twice, nay thrice, I spoke of this $2,500 due to M'r Carlisle and yourself for the recovery of 312, and can name both time and place, and the subjects that brought forth the conversations between us.

I would rather almost have lost my hand than this disagreable should have occurred.

Filed by the defendant this 10th day of February, 1874.

RICHARD L. WALLACH.
Examiner.

EXHIBIT J. M. C., No. 3.

TO MESS'RS CARLISLE & MCPHERSON: In reply to your notes recently received, calling my attention to your demands, I regret to see that your recollection is utterly at fault as to the fee promised in the Lewis and Angus case.

I distinctly remember the sum proposed, which was just half the amount you now claim, and was to be paid out of the proceeds of sales of the property as such proceeds shall be realized.

170 I am not insensible to the expressed "reluctance" of M'r Carlisle to appear in court against me in such an issue, while on the other hand I fully appreciate the readiness of M'r McPherson to place me in that position. The difference between the two gentlemen is not unworthy of observation.

As to "the balance of borrowed money," I intend to pay it so soon as I can raise the funds, and shall continue to exert myself to accomplish this as early as possible. The case of Cox vs. A. and L.,

although I do not think I am aided much by M'r McPherson; and I must protest against his advising my creditors not to pay me my honest dues until he has been consulted. I did suppose the profession of the law was to maintain justice, not to oppress widows nor obstruct the fulfillment of just obligations. If, however, you gentlemen imagine that your rights are impaired by any fault of mine, much as I deprecate the necessity, I shall not shrink from the ordeal. I do not wish to trespass on the time, much less to excite the ill-will, of those who, having begun by acting as my friends, threaten to end by becoming my persecutors. I will therefore close this long letter.

Very respectfully,

MARY A. COX.

Filed by defendant this 10th day of February, 1874.

RICHARD L. WALLACH,
Examiner.

MONDAY EVENING, *March* 25, 1873.

EXHIBIT J. M. C., No. 4.

DEAR M'R MCP.: In the top of my trunk I found this morning the paper you want. I am used up, being so sick last evening and night I had to give up and go to bed, or I would come over myself. Will you pardon my seeming want of appreciation of your kindness in giving me the use of your purse, and which I partly repaid you on Thursday evening in the sum of $1,000. I know it is well stocked, but it was kind, very kind, and I offer you my grateful, heartfelt thanks.

Truly, your friend,

M. A. COX.

Filed by the defendant this 10th day of February, 1874.

RICHARD L. WALLACH.
Examiner.

171 *Decree.—Filed March* 4, 1874. *R. J. Meigs.*

In the supreme court of the District of Columbia, in equity, March, 1875, special term.

Between { MARY A. COX, COMPLAINANT, *and* JOHN D. MCPHERSON, DEFENDANT, } Eq. doc. 12. No. 3268.

This cause coming on to be heard at this term and is argued by counsel, and upon consideration thereof the court is of the opinion and doth find that on account of the ill-feeling and unfriendly relations existing between the said Mary A. Cox and the said John D. McPherson, by reason of the controversy and angry disputes between them, especially in regard to the claim against her by him for a fee of five thousand dollars, in behalf of himself and his copartner, and a claim of a lien therefor upon the bond in controversy and against so much of the fund and indebtedness secured by the said bond and by the deed of trust, it is fit and proper that the said John D. McPherson should cease to be such trustee.

Wherefore, and without consideration of any other of the allegations of the complainant wherefor such relief is prayed, it is by the court here

ordered, adjudged and decreed that the said John D. McPherson be and he is hereby discharged from the said trusteeship created by the conveyance in trust made on the twenty-sixth day of November, A. D. 1870, unto himself and Jesse B. Wilson by Charles H. Holden, Charles W. King, and Samuel Ford, of square No. 312, in the city of Washington; and that all the right, title, and interest that did vest in him by that conveyance, and all the powers by it conferred upon him do pass from and be divested out of him, and do pass to and vest in his co-trustee, Jesse B. Wilson, who shall take, hold, and have the same as fully in every respect as if the said conveyance had been made unto him
172 alone as sole trustee, with full and ample power to sell and convey as such, under the said deed, upon demand of the said Mary A. Cox, her executor, administrator, or assigns.

And it is further ordered, adjudged, and decreed that the said John D. McPherson do forthwith deliver to the said Jesse B. Wilson the bond of Mary A. Cox, the complainant, for $38,000, in the pleadings in this cause mentioned, and that the said Jesse B. Wilson do hold the said bond of Samuel Ford, Charles H. Holden, and Charles W. King, as receiver especially appointed for this purpose, until the further order of the court, and do in the mean time freely permit the said Mary A. Cox to endorse and thereby credit thereon any payment made unto her of interest or principal: provided, however, said principal be not thereby reduced below the sum of ten thousand dollars.

And the court being of opinion that under the pleadings and issues in this cause it hath not jurisdiction to inquire and adjudge in regard to the alleged indebtedness, or the amount thereof, of the said complainant to the said John D. McPherson and James M. Carlisle, nor whether on account thereof the said John D. McPherson hath a right to hold and retain said bond by virtue of a lien in favor of the said James M. Carlisle or otherwise, the court doth not pass upon the questions touching such claim, but will retain this cause without making final disposition thereof, or further order or direction herein, until the said James M. Carlisle and John D. McPherson shall have had opportunity, if within a reasonable time they see fit, by proper suit here or elsewhere to have it adjudged whether the said Mary A. Cox is indebted to them as they allege, and if so, in how much, and whether they have therefor any lien on the said bond, or the said John D. McPherson any right for the security of such indebtedness to retain said bond.

By the court.

173 *Appeal to gen. term.—Filed Mar. 4th*, 1875.

In the supreme court of the District of Columbia.

MARY A. COX *vs.* JOHN D. McPHERSON. } 3268. Equity docket 12.

The defendant takes an appeal to the next general term from the decree passed this morning by the court in the above-entitled cause.

March 4th, 1875.

GEO. F. APPLEBY,
Sol'r for Defendant.

Appeal entered as directed. By the clerk.

Decree in general term, May 10, 1875.

In the supreme court of the District of Columbia.

MARY A. COX, COMPLAINANT, *vs.* JOHN D. MCPHERSON, DEFENDANT. } 3268. Equity.

This cause came on to be heard upon the appeal of the defend-
174 ant, John D. McPherson, from the decree of the special term of March 4, 1875, and his counsel declining to argue the cause, having submitted it upon his brief, and the counsel of the appellee having briefly stated the case to the court, thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the aforesaid decree of the special term be, and the same is hereby, affirmed, with costs.

By order of the court.

Appeal to S. C. U. S., May 11.

MARY A. COX *vs.* JNO. D. MCPHERSON. } 3268. Equity.

The defendant, John D. McPherson, by his solicitor, M'r Appleby, prays an appeal from the decree pronounced in this cause yesterday to the Supreme Court of the United States, and the same is allowed here now in open court.

By order of the court.

175 In the supreme court of the District of Columbia, the 13th day of May, 1875. In equity.

MARY A. COX, COMPLAINANT, *vs.* JOHN D. MCPHERSON, DEFENDANT. } No. 3268. Eq. doc. 12. Appeal.

Know all men by these presents, that we, John D. McPherson and George W. Riggs, are bound unto the above-named Mary A. Cox in the sum of six thousand dollars, to be paid to the said Mary A. Cox, her executors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 13th day of May, 1875.

Whereas the above-named John D. McPherson hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named John D. McPherson shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

JNO. D. MCPHERSON. [SEAL.]
GEO. W. RIGGS. [SEAL.]

Sealed and delivered in presence of—
ROB'T W. MCPHERSON.

The foregoing bond is hereby approved this 14th day of May, 1875.

D. K. CARTTER,
Chief-Justice.

176 *Clerk's certificate.*

CLERK'S OFFICE, *Supreme Court of the District of Columbia:*

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 21st day of September, 1875.

[SEAL.]

R. J. MEIGS, *Clerk.*
By L. P. WILLIAMS, *Assistant Clerk.*

(Indorsement on cover:) No. 199. John D. McPherson, appellant, vs. Mary A. Cox. Dist. of Col. sup. court. Filed 12th October, 1875.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

JOHN D. McPHERSON, *Appellant*,
vs.
MARY A. COX. } No. 199.

BRIEF FOR APPELLANT.

This case comes up by appeal from a decree of the Supreme Court of the District of Columbia, discharging the appellant from a certain trusteeship, and directing him to part with the possession of a certain bond, on which he claimed a lien as an attorney and solicitor.

ABSTRACT OF PLEADINGS AND PROOFS.

It appears from the record that on June 11, 1873, the appellee, Mrs. Cox, filed in the court below, holding a special term in equity, her bill of complaint against the appellant, Jno. D. McPherson, alleging that he was an attorney and counsellor-at-law, resident in the District of Columbia, and a member of the firm of Carlisle & McPherson. That on the 26th day of November, 1870, she was the owner, in fee simple, of square 312, Washington, D. C. That on said day she sold the same to Messrs. Holden, Ford & King for $38,000, payable in ten years from date, with interest, payable annually. That the purchasers, for the payment of said sum, executed and delivered to her their bond, of which the appellant has possession, and also executed a deed of trust, conveying

said property to Jno. D. McPherson and Jesse B. Wilson, and the survivor of them, his heirs and assigns, as trustees, to secure the payment of said $38,000, and the annual instalments of interest thereon, with a power of sale on default of the payment of the principal, or of any annual instalment of interest. That the appellant was so made trustee by her selection, and was at that time, in conjunction with Mr. Carlisle, her counsel, and had for several years theretofore been her counsel. That the trusts under said deed of trust were accepted by said Wilson and the appellant, and that both were living and were acting as trustees. That Holden and King had transferred their interests to Ford. In her said bill she prays that all the estate, right, title and interest vested in the appellant by and under the said deed of trust be divested, and that he be decreed to bring into court, to be delivered to her, the bond of $38,000. In the said bill she assigns for reasons why the appellant is unfit to be trustee the following:

1. That the annual interest accruing due was her only means of support; and that the appellant had twice notified Ford not to pay her the interest accruing due without consulting him; and that in consequence of this notice from him, Ford had refused, and still refused, to pay any interest; and if the said McPherson continued trustee, would refuse to pay interest for the ensuing year. That it was the duty of appellant to see to it that this interest was promptly paid.

2. That he had allowed the land to be sold for nonpayment of taxes, and had not taken any step to compel payment of the taxes, or redemption of said lots; and in this had shamefully neglected his duty as trustee.

She then states that in consequence of these acts and omissions she had written him a letter in May, 1873, to resign his trust; and that it is true, as in that letter stated,

that friendly relations do not exist between herself and the appellant, the chief cause thereof being what she regarded as exorbitant demands, in bad faith, made of her by him for the firm of Carlisle & McPherson.

She interrogates specially the defendant as to each and every averment in the bill contained, and asks for his answer under oath. Rec., pp. 1–5.

The deed of trust is exhibited, (Rec., p. 5,) and also the letter written to appellant. (Rec., p. 7.) In this letter to him, she gives as reasons why she will ask for a new trustee: 1st. His instructing Mr. Ford twice not to pay her interest; and 2d. His retaining the bond given by Ford, Holden & Co.

On June 27, 1873, Mrs. Cox filed an amended bill, in which she alleged that Mr. McPherson had advised her to release two lots which the said Ford was about to sell, and on which houses were to be erected; "to advise her to make which release, he assured her that she should be paid $2,000 in money (which was paid), and have the notes of the purchasers to the amount of $13,000, secured by a first mortgage on three of the lots released; and upon such assurance she made the release, and received the money and notes;" but that since the filing of her bill she has, to her astonishment, learned that three other notes for $1,000 each, falling due before the notes given to her, and the execution of which was kept secret from her, were secured by the same deed of trust. That this was known to the said McPherson, but not known to her. That the holder of said notes due before hers *intends*, if said notes are not paid at maturity, to demand and compel a sale of the property. That said McPherson demands of her, unjustly and wrongfully, an exorbitant fee for services rendered, before he was trustee, by the law firm of which he is a member; and will have the power, if the premises should be sold, of retaining, to her wrong and

injury, the said fee; which interest and claim makes him unfit to be trustee. Rec., pp. 8, 9.

After the filing of this bill, and amended bill, and before Mr. McPherson was furnished with any copy, the appellee procured the originals, to be taken from the files and sent to Judge Wylie's residence. Rec., pp. 10, 11.

After the lapse of several months they were returned to the files, and Mr. McPherson's answer was then promptly filed under oath, as required. He answers each and every interrogatory put to him, repeating the interrogatory to which he makes answer. He explains the whole transaction respecting the employment by her of himself and Mr. Carlisle as her attorneys. Shows that during the war she had agreed to sell the square of ground No. 312 to the lessees thereof for $15,000; and that in September, 1867, after the property had greatly risen in value, she went to Mr. Carlisle to secure his services in getting possession of the property, and a rescission of her contract to sell it for $15,000. That she offered Mr. Carlisle and himself a fee of $5,000, contingent on success, and payable out of the property when sold. That they undertook her business; recovered the property, which she sold for $38,000; recovered back rents and mesne profits amounting to $2,700. That after she had received in cash and notes $15,000, besides $1,250 back rents (without paying them anything on account of their fee for the recovery of the property), he called her attention to the fee of $5,000, earned and already payable, whereupon she denied the amount of the fee to be $5,000, but said it was only $2,500. Thereupon Mr. McPherson gave notice to Mr. Ford that, as Mrs. Cox's attorney and solicitor, he had a lien on the bond given for the purchase-money, and that he had possession of it as security for the fee of $5,000, and that he Ford must not make any payment to her on account of it, until the attorney's lien was satisfied; that when he learned, from the complainant, that Mr. Ford

considered this notice as a reason for not paying interest he told Mr. Ford that he did not desire to stop the payment of interest but only of the principal to the amount of the fee due Carlisle & McPherson and interest thereon; that all this occurred prior to the filing of the bill, and Mr. McPherson denies that Ford's non-payment of interest is in consequence of any notice given by him, but asserts that it is in consequence of Ford's embarrassments which have caused him to leave the taxes also unpaid. He also denies that the interest on the amount of this purchase-money was Mrs. Cox's sole means of support. He says she owned the adjoining square, No. 311, and some other lots, all of which are very valuable and yield some income. He shows that it is simply absurd to allege that he had neglected his duty as trustee in the non-payment of taxes or in the non-collection of interest when due; that no such duties are imposed by the deed of trust; that he had no right to act in the premises without the concurrence of his co-trustee; that Mrs. Cox never requested him to enforce the power of sale.

The answer further shows that Mrs. Cox always transacted her own business affairs, made all her bargains herself, thoroughly understanding every proposition in all its bearings, and that the transaction adverted to in the amended bill, touching three notes which were secured by the same deed of trust, securing her the payment of twelve notes amounting to $13,000, occurred in her presence, the three notes being sold and delivered before her eyes; that the sale of the notes was made necessary by Mrs. Cox's own exactions; that everything he (McPherson) did in the premises was simply to carry into effect bargains made by herself. Rec., pp. 11–18.

Issue being joined on this answer, testimony by both parties was taken. Mrs. Cox caused to be taken the depositions of Messrs. Ford and Holden, (Rec., pp. 36 and 45,) who bought her property; of Mr. Benedict, (Rec., p. 40,)

who negotiated the purchase of the three notes first falling due of $1,000 each; of Mr. James T. Pike, (Rec., p. 44,) who purchased three of the lots released by Mrs. Cox, and of whose fifteen promissory notes given to Holden and Ford for the purchase money, twelve amounting to $13,000, were endorsed by Holden and Ford and given to Mrs. Cox. Pike purchased three lots for $5,333.33 each, aggregating $16,000. He gave to McPherson and Wilson, the same trustees, a deed of trust on each lot to secure the payment of $5,333.33, represented by five promissory notes, four notes being for the sum of $1,000 each and one note for $1,333.33, and payable in 2, 3, 4, 5, and 6 years, respectively, and after taking these depositions she closed her case on the 30th of January, 1874. Rec., p. 49.

Mr. McPherson then caused to be taken the testimony of Mr. James M. Carlisle, (Rec., p. 50,) which sustained him in all the averments mentioned in Mr. McPherson's answer, of which Mr. Carlisle had knowledge. Mr. Carlisle exhibits with his testimony letters written by Mrs. Cox. By the testimony of Mr. Ford, (Rec., p. 38,) who was Mrs. Cox's own witness, it was shown that she had been paid interest by him, notwithstanding Mr. McPherson's notice, and before Mr. McPherson countermanded the notice; and when cross-examined as to the reason why the interest was in arrears he replied, "*Because I had not the money*, and *through the courtesy of Mrs. Cox*, and on account of the *delinquency of others to me*." (Rec., p. 39, and 39–40.) He said further, that Mrs. Cox was present at the time of the payment of between $2,400 and $2,500 to him for the three notes first falling due. That he used this money in the payment to Mrs. Cox of $4,253.66 on that day; that he laid the money on the table where Mr. McPherson and Mrs. Cox were sitting, (Rec., pp. 37–38;) that there was a dispute between him and Holden and Benedict as to the amount of discount which was to be taken off the notes, which lasted some time, and which

was settled by Holden agreeing to assume the amount in dispute. He says Mrs. Cox was there, and there was no secrecy in the matter. Mr. Benedict (Rec., pp. 40-41) stated that Mrs. Cox was present about two hours in Mr. McPherson's office, and that she was present during the time of the discussion of the discount; that whilst so present the notes were written out by one Mr. Storrs, (who with Mr. Benedict had raised the money), were signed by Mr. Pike, endorsed by Holden and Ford, and were laid out in series, when Mr. Ford delivered three of the notes for $1,000 to Mr. Storrs, and Mr. Storrs paid the money for the notes. Mr. Benedict had a subsequent interview with Mrs. Cox after she had contemplated bringing this suit, as to which he (being Mrs. Cox's witness) says in direct examination, "She insisted that the notes I purchased were the notes due in *six years* instead of two."

Mr. Holden's (Rec., p. 45) testimony shows that Mrs. Cox was present during said transaction; that the bargain with Pike had been pending several weeks, and that he himself had seen Mrs. Cox about the sale to Pike. Upon this testimony the parties on February 12, 1874, rested their case, and the same was set for final hearing by Mr. McPherson.

In his answer Mr. McPherson had objected to the bill of complaint for want of proper parties. On March 3, 1874, (Rec., p. 18.) Mrs. Cox files her first supplemental bill, so-called, stating that the holders of the three notes secured each by deed of trust from Pike to Wilson and McPherson, have notified the trustees to sell; that on December 11, 1873, the said McPherson applied for and received from the office of the recorder of deeds the three deeds of trust given by Pike, and now has possession of same; that said McPherson claims by his answer to have a lien as her attorney, on the bond of $38,000 to secure the fee due him and his partner. She denies that she ever offered to pay $5,000, or any larger fee than $2,500, and she avers

that the fee of $2,500 is five times too large a compensation for the services rendered,and that the same is an exorbitant charge; that if the said McPherson makes sale as trustee it is his purpose to apply the proceeds of sale to the satisfaction of his fee of $5,000; that by the deeds of trust made by Pike it was covenanted by said Pike that he should pay the taxes and keep the property insured; that the taxes have not been paid and the property has not been insured; that said Pike alleged that he had put in the hands of the said McPherson $150 to keep the property insured, and thereupon she puts to Mr. McPherson specific interrogatories, among which she asks if it is not his purpose and intention out of the proceeds of sale to pay to himself and Mr. Carlisle the fee of $5,000, and if the said Pike did not place in his hands $150 to have the buildings insured. (Rec., pp. 18–21.) With this supplemental bill is exhibited the deeds of trust made by Pike. (Rec., p. 21.) They contain this provision (page 23): "In case the said James T. Pike, his heirs or assigns, shall fail to pay taxes or keep said property so insured, then the taxes may be paid and the property be insured for the amount aforesaid by the *legal holder* of the notes before mentioned, and the amount of taxes and premium shall be considered a part of the expenses of the note secured thereby," &c. These deeds also contain the provision, that in case of any sale the trustees are to pay "out of the proceeds of sale or sales: 1st, All proper costs, &c.; 2d, to pay whatever may then remain unpaid of the said notes and the interest thereon, whether the same shall be *due or not;* and, lastly, to pay the remainder, if any, to said James T. Pike, his executors, &c."

To this supplemental bill Mr. McPherson filed an answer, (see pp. 24–29,) calling attention of the court to the fact that testimony had been taken and the cause set by himself for hearing; that the holders of the notes ordering sale are satisfied with the trustees, as shown by writings

exhibited; that the deeds of trust Pike made contain the provisions (as above recited) which do not make her so-called supplemental bill consistent with the amended bill. He admits that his counsel obtained from the recorder's office the three deeds of trust made by Pike, but that he obtained them to file in evidence, and did file them, and he shows that no harm, but a benefit rather, would be done her under the deeds of trust in question. He further shows that she never mentioned in her bill and amended bill the fee of $2,500, which she says she promised, until she filed her supplemental bill, and that this was after the taking of Mr. Carlisle's testimony and the exhibiting by him, the said Carlisle, of letters written by herself, in which she says she will honestly pay the sum of $2,500 for the services rendered by Mr. Carlisle and himself. The defendant submits that she does not offer to pay into court the $2,500 which she says is due to him for fees, or to secure its payment, and unless she offers to do equity he appeals to the court to protect his attorney's lien on the bond by refusing to make the decree asked by Mrs. Cox with reference to the bond. He shows that the object of the suit is not to remove a trustee who in her belief has acted *mala fide*, but to enable her to evade the payment of any fee. He denies that it is his purpose to apply the proceeds of any sale otherwise than as directed by the deed of trust, and shows that it would be futile for him to attempt any misapplication of such proceeds without the concurrence of his co-trustee. Touching the allegation that Pike had told Mrs. Cox he had paid him (McPherson) $150 to keep the property insured, he says the allegation is faulty for want of an averment by Mrs. Cox that she believed said Pike when he made the statement, if he ever did make it; but notwithstanding the want of such an averment he answers and positively denies that the said Pike ever paid him said sum or any sum for such a purpose. He then, according to a

reservation, demurs to the bill for want of parties, for multifariousness, and because the complainant does not offer to do equity by paying to him or bringing into court the $2,500 which she says is honestly due. Then comes a second supplemental bill, filed May 23, 1874, (Rec., p. 30,) which says that since the filing of the last the holder of one of the three notes first falling due, insisting on a sale by the trustees for default in the payment thereof by Pike, the property was advertised, and she, to prevent the sale of the property bought the note and had to pay to McPherson and Wilson half commissions. Answer is made, (Rec., p. 32,) denying *in toto* the allegations of this bill. Before this second supplemental bill was filed the deposition of Mrs. Cox was taken, in which she attempts to prove that the transaction aforementioned about the negotiation of the three notes, which in her amended bill she says was kept secret from her, occurred in the back room of Mr. McPherson's office, and that she sat all the time in the front office; that she never left the chair which she first took till she was ready to come home; that she did not see Storrs write the notes—did not see Pike sign them, nor Holden and Ford endorse them, and that all were in the back room excepting Mr. McPherson and herself, and when they came out they bowed to her, and after talking a little while they all left with the exception of Mr. Ford, who laid down a bundle of bank notes on the table where Mr. McPherson was sitting. (Rec., p. 56.) She says that Holden had approached her with propositions, and that she referred him to Mr. McPherson. She said that she was to have $2,000 in money for interest, which she got, $2,000 of the principal, which she got, and $13,000 in notes and security on the houses for them, which she got; and touching this matter she uses this language: "In justice to Mr. McPherson I say he did not tell me this, but it was Mr. Holden." (Rec., p. 56.) She says she expected to get the notes due in *two*, three, four and five years, but found out

when she got home that the notes were due in three, four, five and *six* years, (see *supra*, statement of Benedict, her own witness *contra*), but she further says that the time made no difference, as she expected to live on the interest. Touching the fee due Carlisle & McPherson she said that she did not understand that it was to be paid, as the same should be realized in the sales to be made of the property, and in her letter of March 20, 1873, exhibited with Mr. Carlisle's testimony, she says it was to be paid out of the proceeds of sales as such proceeds should be realized. When asked why she caused to be sent the bill and amended bill to Judge Wylie's residence, she replied, to expedite matters, that Mr. Bradley had told her that Mr. McPherson had no objection to her having any other trustee than himself.

After the giving of this deposition James T. Pike, James T. Benedict, and Samuel Ford, the witnesses before produced by Mrs. Cox, were recalled by Mr. McPherson, and Mr. Storrs was also examined. They testify that all the notes were written out, signed, and endorsed in the front office, where Mrs. Cox was sitting, (and where she says she was sitting,) and that the money was paid on the notes in the said front office, and that all the notes signed by Pike were laid in series on the table in the front office. (Rec., pp. 71–73–74–71.) Mr. Carlisle was also recalled in rebuttal of Mrs. Cox's testimony, (pages 74 and 75,) and Mr. McPherson gave his deposition, explaining very minutely every transaction. Rec., p. 74.

After this additional testimony was taken a third supplemental bill, so called, was filed, (Rec., p. 34,) making, by way of amendment of bills and of first and second supplemental bills, Holden, Ford, and King, and their respective wives, parties. They answered that whilst they believed their interests abundantly secure under the present trustees, they would rest their case with the court if a change should be determined on. (Rec., p. 35.) This last supplemental

reservation, demurs to the bill for want of parties, for multifariousness, and because the complainant does not offer to do equity by paying to him or bringing into court the $2,500 which she says is honestly due. Then comes a second supplemental bill, filed May 23, 1874, (Rec., p. 30,) which says that since the filing of the last the holder of one of the three notes first falling due, insisting on a sale by the trustees for default in the payment thereof by Pike, the property was advertised, and she, to prevent the sale of the property bought the note and had to pay to McPherson and Wilson half commissions. Answer is made, (Rec., p. 32,) denying *in toto* the allegations of this bill. Before this second supplemental bill was filed the deposition of Mrs. Cox was taken, in which she attempts to prove that the transaction aforementioned about the negotiation of the three notes, which in her amended bill she says was kept secret from her, occurred in the back room of Mr. McPherson's office, and that she sat all the time in the front office; that she never left the chair which she first took till she was ready to come home; that she did not see Storrs write the notes—did not see Pike sign them, nor Holden and Ford endorse them, and that all were in the back room excepting Mr. McPherson and herself, and when they came out they bowed to her, and after talking a little while they all left with the exception of Mr. Ford, who laid down a bundle of bank notes on the table where Mr. McPherson was sitting. (Rec., p. 56.) She says that Holden had approached her with propositions, and that she referred him to Mr. McPherson. She said that she was to have $2,000 in money for interest, which she got, $2,000 of the principal, which she got, and $13,000 in notes and security on the houses for them, which she got; and touching this matter she uses this language: "In justice to Mr. McPherson I say he did not tell me this, but it was Mr. Holden." (Rec., p. 56.) She says she expected to get the notes due in *two*, three, four and five years, but found out

when she got home that the notes were due in three, four, five and *six* years, (see *supra*, statement of Benedict, her own witness *contra*), but she further says that the time made no difference, as she expected to live on the interest. Touching the fee due Carlisle & McPherson she said that she did not understand that it was to be paid, as the same should be realized in the sales to be made of the property, and in her letter of March 20, 1873, exhibited with Mr. Carlisle's testimony, she says it was to be paid out of the proceeds of sales as such proceeds should be realized. When asked why she caused to be sent the bill and amended bill to Judge Wylie's residence, she replied, to expedite matters, that Mr. Bradley had told her that Mr. McPherson had no objection to her having any other trustee than himself.

After the giving of this deposition James T. Pike, James T. Benedict, and Samuel Ford, the witnesses before produced by Mrs. Cox, were recalled by Mr. McPherson, and Mr. Storrs was also examined. They testify that all the notes were written out, signed, and endorsed in the front office, where Mrs. Cox was sitting, (and where she says she was sitting,) and that the money was paid on the notes in the said front office, and that all the notes signed by Pike were laid in series on the table in the front office. (Rec., pp. 71–73–74–71.) Mr. Carlisle was also recalled in rebuttal of Mrs. Cox's testimony, (pages 74 and 75,) and Mr. McPherson gave his deposition, explaining very minutely every transaction. Rec., p. 74.

After this additional testimony was taken a third supplemental bill, so called, was filed, (Rec., p. 34,) making, by way of amendment of bills and of first and second supplemental bills, Holden, Ford, and King, and their respective wives, parties. They answered that whilst they believed their interests abundantly secure under the present trustees, they would rest their case with the court if a change should be determined on. (Rec., p. 35.) This last supplemental

bill is filed to cure the objection made by defendant as to the want of parties, but it failed to make Jesse B. Wilson, the co-trustee, a party, or to make parties James T. Pike, James M. Carlisle, and others mentioned by the defendant as proper parties to be made.

From this statement the court will readily see that the allegations touching Mr. McPherson's conduct in the premises are not only not proven, but are disproved in every particular; that if unfriendly relations existing between a trustee and *cestui qui trust* be ever a ground for the removal of a trustee, the complainant below did not base her application distinctly on this alleged ground, and that it is her fault, not Mr. McPherson's, as Mr. McPherson himself says that friendly relations no longer exist. Rec., p. 17.

After the supplemental bills and the answer thereto were filed Mrs. Cox's counsel joined issue with the defendant and set the cause for hearing on original and amended bills and answers thereto and on the supplemental bill and answer thereto.

The court below made a decree March 4, 1875, (Rec., p. 91,) and as therein recited without considering the proof or any of the allegations excepting the incidental averment of the unfriendly relations of Mrs. Cox with Mr. McPherson, the court decreed that Mr. McPherson be discharged from the trusteeship created by the deed of November 26, 1870, made by Holden, Ford, and King to himself and Jesse B. Wilson, and all the right, title, and interest that vested in him by that conveyance and all the powers conferred thereby do pass and be divested out of him, and pass to and be vested in the co-trustee, Jesse B. Wilson; and the court further ordered that the bond of $38,000 be delivered by the said McPherson to the said Wilson, to be held by said Wilson as receiver for a reasonable time to allow the appellant to establish his lien by his proceedings, permitting Mrs. Cox in the mean-

time to endorse and credit thereon any payment made to her of principal or interest, provided the principal be not thereby reduced below $10,000. The decree refuses to find whether the complainant had or had not a lien on the bond, but remits him in effect to his action at law, for in such action alone can it be determined "whether Mrs. M. A. Cox is indebted to them as they allege."

From this appeal a decree was taken to the court in general term; and that court, on the same day when it came on to be heard, decided the case, and entered a decree affirming the decree below; from which, on the next day, an appeal was taken to this court.

Assignment of Errors.

I. The court erred in removing the appellant from his office of trustee.

(*a*). The ill-feelings and unfriendly relations of the appellee towards and with the appellant constitute no ground for such removal. The grantors, who constituted him trustee, were satisfied with him.

(*b*). The appellant was in no fault in any of the transactions complained of by the appellee; and the court, in decreeing the removal of the trustee, acted arbitrarily and without a full consideration of the whole case. The court, after finding the fact that unfriendly relations existed, declared that it did not consider any of the other allegations of the bill, and paid no regard to the testimony.

(*c*). The bill to remove the trustee proceeds upon the most gross and circumstantial charges of professional misconduct, indicative, as the bill charges, of enmity to the appellee. The appellee not only did not prove one of her charges, but the appellant disproved them; and it was unjust and inequitable to grant the prayer of the bill, and remove the trustee on the ground of the existence of ill-feelings—which had grown out of the very controversy in question.

II. The court erred in decreeing the appellant to part with the possession of the bond on which he claimed an attorney's lien.

(*a.*) The court assumed that the defendant invoked its active interposition respecting his attorney's lien on the bond in controversy, and refused to take jurisdiction and adjudge whether the appellant or his partner had a lien upon the bond as set up in his defense, and, in effect, remitted him to his action at law to have it adjudged whether the appellee was indebted to him and his partner as alleged, and whether they had a lien on the bond for such indebtedness.

(*b.*) The appellant's lien, like all solicitor's liens on client's papers, depended for its value solely upon the *possession* of the papers and his power to deny to the client access to them. By depriving the appellant of possession of the paper in question, and placing it in the hands of a third party with directions to allow the appellee access to it, the court deprived the appellant of the entire value of his liens.

III. The court erred in not dismissing the bill.

(*a.*) Upon the grounds of demurrer set forth in the answer the bill should have been dismissed for want of proper parties, both as regards the trustees' title and the bond, and as being multifarious, and particularly because the complainant, while admitting that something was due to the defendants for services, did not offer to pay any thing whatever in discharge of the debt before receiving the bond, and because, touching the bond, the complainant has a remedy at law.

(*b.*) Upon the want of proof to sustain the allegations of the bill of complaint.

(*c.*) Upon the showing that the suit was prematurely brought. It appearing that there was no necessity for any present exercise of the power of sale.

Argument.

I.

(*a.*) The decree assigns an insufficient reason for discharging the trustee.

A. Ill-feelings and unfriendly relations of the complainant toward and with the defendant constitute no ground for removing him from the office of trustee.

Foster *vs.* Davis.
4 De Gex, Fisher & Jones, p. 139.
Gibbes *vs.* Smith, 2 Rich. Eq., page 134.
Berry *vs.* Williamson, 11 B. Monroe, 245.
Hill on Trustees, *191 *in notis.*

All the cases here cited arise from the complaints of women. It shows that the court would set a dangerous precedent by establishing a doctrine that a trustee must be removed because a *cestui que trust* harbors unfriendly feelings towards him. Some women are naturally capricious, and may be pleased to-day with their trustee and to-morrow not only displeased, but bitterly envenomed.

In the English case cited the trustee was removed in the court below, but in the appellate court the decree was reversed. This was in the High Court of Chancery, 1861, and Lord Justice Turner, with whom Lord Justice Knight Bruce concurred, in delivering the opinion of the court, said: "I certainly cannot agree with the argument at the bar that the mere fact of there being a discussion between *cestui que trust* and trustee, is a sufficient ground for this court removing that trustee from the trust because, the consequences of that would be that *cestui que trust* might at any time raise a quarrel with the trustee, and thereupon come to this court to discharge the trustee and remove him from the trust upon the ground of the impossibility of their acting together."

In the Kentucky case the court below removed the

trustee; but the appellate court reversed the decree. The charges against the trustee were that he was disregardful of the interest of the beneficiaries; dilatory, obstinate, capricious, arrogant, arbitrary and tyrannical; and that he held on to the trust against the wishes of the beneficiaries from the mercenary motives of gaining the five per centum commission given by the trust. The court found from the evidence that there was dissatisfaction and dissension between some of the *cestuis que trust* and trustee, and remarked that there was considerable asperity of temper and expression displayed in the pleadings commenced by the complainants, and reciprocated or retorted by the trustee in repelling their charges; and yet the court reversed the decree below, and refused to remove the trustee. The court says: "Upon the question of removal the important inquiries are: Is the trustee competent to the duties of his trust? Has he thus far discharged them faithfully and with reasonable discretion and diligence, and is there any reasonable ground to apprehend a failure thus to perform them in future? Has he willfully and injuriously to the beneficiaries assumed any right, or neglected any duty, or otherwise abused his authority as trustee? Is there anything in his personal character, or conduct, or situation, which renders him unfit to hold the office, or will prevent a beneficial exercise of its duties by him? If all these questions are answered in favor of the trustee, there would seem to be no room left for any just cause of removal; and if some of them were even answered unfavorably to him, the enquiry would still remain as to the nature and importance of the defect, and whether removal would be the appropriate consequence." We submit that upon consideration of the testimony in this case, all such enquiries would be answered favorably to the defendant.

B. If unfriendship or disagreement between *cestui que trust* and trustee is ever to be considered a just or suffi-

cient ground for the removal of a trustee, it certainly must be in those cases where the trustee has the management of the estate; where he has possession, and collects the rents and profits; where he is obliged to make investments and reinvestments; change securities, disburse moneys, and render accounts from time to time, in which cases it may become necessary for the *cestui que trust* to approach the trustee, to consult with him, and to confer with him in reference to the matters of the trusteeship, as was the fact in the cases cited. It certainly could not embrace a case like the present, where the trustee has no management of the property; where the grantors of the deed of trust are in possession of the estate, as to which the trustee has no right to interfere; where the complainant has no interest whatever in the land held by the trustee, and is not a *cestui que trust* as to the land, but only has an interest in an amount of money secured on the land, and payable out of the proceeds of sale, in case of a sale by the trustee, and which sale can be made by the trustee only in certain contingencies. If the contingency arrive, the complainant can request the trustee in writing forthwith to make the sale. If he refuses, then she can apply to the court either to change the trustee or to compel him to proceed, or bring a foreclosure suit, having the property sold under the direction of the court. It may be that when the contingency arises Mr. McPherson may be deceased, and the surviving trustee have full power; or that a stranger to whom Mr. McPherson is friendly be the owner of the debt secured by the deed of trust. Does it, therefore, matter whether the complainant is friendly or unfriendly to the trustee? *A fortiori* can no disagreement between the complainant and defendant be a sufficient ground for dicharging the defendant from a trust which he holds jointy with another, and with which other the complainant sustains friendly relations.

(*b.*) The decree is passed without any proof of the allegations in the bill, and indeed without any regard being had to the testimony in the cause.

The defendant thought it idle to make any reply to the letter of complainant asking him to resign and threatening to bring suit for the appointment of a trustee in his stead in case he did not resign. He could not resign the trust. (See authorities *infra.*) It was necessary to bring suit in any event, and hence he says in his answer to the bill of complaint, he could not resign the trust without a decree of the court obtained upon a *proper* bill filed. The complainant knew through Mr. Thos. Bradley, as she herself swears, that the defendant had no objection to her having any other trustee than himself, provided a good man was selected.

The defendant, however, not conscious of any wrong done to the complainant by any act of his, or of any hurt by her suffered on his account, had no reason to suspect that a bill would be filed against him charging gross fraud and crass negligence in the administration of trusteeship. He, therefore, submits that pending such charges, he could not, consistently with his honor and manhood, voluntarily surrender the trusts reposed in him, and that the court holding the special term, undoubtedly without intending so to do, inflicted upon him a grievous injury by not considering the allegations of the bill touching said charges and the testimony in the cause adduced by both parties.

If such allegations were unsupported by proof, the bill should have been dismissed, notwithstanding the fact that the court might have decreed the relief sought if a bill without such allegations had been filed.

Eyre *vs.* Potter, 15 How., 56.

"By the peculiar frame and structure of the bill in this case, the complainant has imparted to the answers a function beyond a mere response to the recitals or charges con-

tained in the bill. The complainant has thought proper specifically to interrogate the defendants. By the answers to these interrogatories the complainant must, therefore, be concluded, unless they can be overthrown by proof."

Ibid., page 57.

This authority is peculiarly in point in view of the fact that by the recent rule of court, the complainant, at the time of filing the bill, could have waived the defendant's oath to his answer, and thus have prevented the application of the rule.

"In removing and substituting trustees the court does not act arbitrarily, but upon certain general principles, and *after a full consideration of the case.*"

Perry on Trusts, sec. 277.

Accordingly, courts will not substitute trustees upon the mere *caprice* of the *cestui que trust*, and without a reasonable cause, and although the instrument of trust or a statute gives the *cestui que trust* full power to remove and appoint other trustees. Ibid., and cases there cited.

Bouldin *vs.* Alexander, 15 Wall., 132.

In no case will the court remove a trustee unless satisfied of the necessity, and the same rules apply to the removal and appointment of trustees under a deed of trust to secure the payment of a debt that apply to the removal and appointment of trustees in any other case.

Perry on Trusts, sec. 277 and sec. 602, m.

Sergeant *vs.* Howe et al., 21 Ill., 148.

A power of sale contained in a deed of trust to secure a debt is a power coupled with an interest, and cannot be revoked by any act of the grantor or donor of the power. In other words, the power is annexed to the property and is an irrevocable part of the security.

Berry *vs.* Skinner, 30 Md., 572.

Perry on Trusts, sec. 602, h., and cases there cited.

See also Peter *vs.* Beverly, 10 Peters, 564.

The trustee is not an *agent*, but an officer constituted by

the parties and vested with the duties of the trust. In the absence of any *mala fides* appertaining to the trust, he will be favorably regarded and treated by the court.

Gibbs *vs.* Smith, 2 Rich. Eq., 134.

Law of Trusts and Trustees by Tiffany and Bullard, 387.

And will not be removed.

21 Ill., 148.

and ought not to be removed where any of the *cestuis que trust* are satisfied with his retention of the office.

Berry *vs.* Williamson, 11 B. Mon., 245.

(c.) The decree ought to have dismissed the bill on the hearing of the proofs.

The complainant, after alleging that the interest due on the bond was unpaid, says that it is because the defendant notified her debtor not to pay interest. The complainant herself shows that the defendant did not notify her debtor as she alleges, until the lapse of about three months after the debt became due. The defendant says the notice applied only to the payment of principal, and that as soon as he understood from the complainant that the debtor thought he was not to pay her any interest, he warned the debtor to pay her interest. The debtor has paid all the interest, paid part of it even while the prohibition of the defendant was in force, and when called by defendant as her own witness, says the defendant had long before withdrawn the prohibition, and that it was through the courtesy and indulgence of the complainant, and because he had not the money, that he did not pay the interest. And yet she swears that this debtor faithfully obeyed the defendant, and that the defendant, out of malice, wanted to deprive her even of her daily subsistence. She swears also that the defendant *shamefully* neglected his duty in the payment of taxes. She exhibits the deed of trust, and there is no such duty imposed on the trustee. The court

may easily test the value of her epithets in this reckless swearing, by the examination of the testimony hereafter.

She says that the defendant kept secret from her the fact that three other notes than those of which she was holder were secured by the same deed of trust. She tries to prove this by her surprise manifested to parties when told that there were such notes, but this surprise was *post litem motam*, although she swears that because of it she consulted counsel to file a bill to remove the trustee, and being *post litem motam*, might very well have been feigned, and very likely to be feigned by a woman who thought, (see her correspondence,) that friends to whom she had spoken about the fee in controversy, could corroborate her testimony. Her own witnesses prove, however, that the notes, the existence of which she swears was kept secret from her, were executed, endorsed, and delivered in her very presence.

Again, Mrs. Cox says the rent was voluntarily paid by Angus & Lewis after the ejectment was decided, and McPherson had nothing to do but to receive the money, whereas he had to bring suit for the rent, and Mrs. Cox made an affidavit under the 75th rule to be filed with the declaration in which she describes herself as the plaintiff, and swears the rent is due and unpaid, and the money was not paid till judgment and execution.

Again, she swears positively that these houses on which the notes were secured were left uninsured by the trustee in disregard of his duty, whereas the insurance agent proves that they were, when the notes were given, under insurance by policies having nearly a year to run.

She says that insurance was builders' risk only.

The insurance agent proves that the houses were insured in three policies for $3,500 each, (the amount required by the deeds of trust,) and also for a separate claim for builders' risk.

She admits she got from Mr. McPherson polices upon

these houses, and says she found that the companies had failed.

The insurance agent proves that the companies did not fail—not one of them. Two are still among the strongest and best companies in the country; one other has gone out of business, but only after transferring all its risks to other companies to the satisfaction of the insured.

She swears she had determined to bring suit and recover the square when she engaged Mr. Carlisle, and that the suit was begun almost immediately, whereas, in fact, cause of action had not then accrued; no forfeiture had been incurred, as appears by her affidavit, in the rent suit, and by the fact that she sued for rent accrued after Messrs. C. and M.'s engagement, and in fact the suit was not begun for nearly, if not quite, a year after their engagement.

Again, in her supplemental bill she assumes and makes it the ground of a specific charge that Mr. McPherson assured her that she was to have a first mortgage on the Pike houses, and that he secretly suffered other notes to be secured on the property. The question of *secrecy* we have just discussed. As for the representation said in the bill to have been made by Mr. McPherson, Mr. M. produced a letter from Mrs. Cox to him, by which it appears that Mr. Holden had an interview with Mrs. Cox, in which he submitted a proposition, and such conclusions were arrived at that Mrs. Cox instructed Mr. Carlisle and Mr. McPherson to carry out the arrangement proposed by Mr. Holden, provided only that she was made secure, of which they were allowed to judge. Now, that she was secured no one has ever doubted. But who made the representations as to the nature of the security? In her testimony, (Rec., p. —,) Mrs. Cox admits that it was Mr. Holden, and not Mr. McPherson. She says: "In justice to Mr. McPherson, it was Mr. Holden told me this, and *not Mr. McPherson.*"

II.

(*a.*) The decree erroneously assumes that the defendant invokes the court's aid to declare a lien on the bond in the proceedings mentioned for the fees due him and his co-partner, and to ascertain the amount of this fee, and, it would seem, in consequence of this error absolutely refuses to decide upon the validity of the defense set up in the answer.

The defendant takes no such position as is assumed by the court. His position *in hac re* is taken in his answer to the bill and fully defined in his answer to the first supplemental bill.

He avers that he claims a lien on the bond, that his co-partner claims a lien on the bond, that these facts are shown in the complaint, (and wherefore he specially demurs because his co partner is not made a party); that he claims the lien as attorney and solicitor. Now what is his position?

He simply appeals to the court to protect his lien; how? Not by decreeing a lien, which could not be done without the filing of a cross-bill; but by refusing to make the decree asked for by complainant, to wit, to deliver up the bond to her. He shows the court why it should refuse to her such relief. She does not offer to do equity by paying to him the fee which she admits to be due and unpaid.

On the contrary, she asks to be relieved from the payment of even the sum, that she states in writing, that she had promised. The court sees that something is due from complainant to the defendant; that she has not paid a dollar to him for services faithfully rendered and discharged, by virtue of which she gained $23,000. Will it help her to evade the payment of the fees?

The court does not, indeed, grant her the full relief asked; but it deprives the defendant of the possession of the bond, and also, his co-partner, who is not a party to the suit, and is entitled to the possession.

If the co-partner of defendant is not a party to the suit, whose fault is it? Certainly the complainant's. Besides, the defendant can claim a lien for the whole fee. If the whole amount be paid to him, it is a release of any claim that his co-partner can make. If she pays the defendant $2.500, it is a discharge *pro tanto* of the whole amount due to the partnership. The defendant can even sue for the whole amount without joining his co-partner. He conducted the business in court for the recovery of the land. His name alone appeared on record; and an action may perhaps be maintained in his own name on the authority of—

Platt *vs.* Haler, 23 Wendell, 456.
Warren *vs.* Griswold, 8 Wend., 666—

his associate being regarded as a dormant partner.

(*b.*) The lien of an attorney or solicitor is highly favored in equity, and the court will never order any papers in his hands to be delivered up for the client's use without his costs and fees are first paid.

Law Journal, Vol. 1 and 11 of Law Tracts.
Worrall *vs.* Johnson, 2 Jac. and Wal., 218.
Russell's Case, 1 Kenyon, 129.
In Re Murray, 1 Russell, 519.
Paschal's Case, 10 Wall., 483.
Maughan, on Solicitors and Attorneys, pages 107 and 137.

The lien is disregarded and destroyed by decreeing that the attorney part with the possession of the bond. Possession constitutes the sole value of the lien, Adams' Equity, 123* page. Moreover the bond had originally ten years to run, and had yet about six years to run, and the decree only secured for the attorneys the last money that should become due, thus postponing their compensation for a long time. This is, however, in some measure compensated by a provision to pay interest.

She says, that the defendant is her lawyer and creditor, and is therefore unfit to be trustee, but he was such a creditor before he became trustee, and this does not make him unfit.

Prevost *vs.* Gratz, 6 Wheaton, 418.
Justice Washington's Opinion *in notis.*

The fact that he was her lawyer, rather works in his favor for he is subject as such to the same disabilities respecting any dealings in the property that the trustee would be.

Zeigler *vs.* Hughes, 55 Ill., 288.

She says that the defendant had made exorbitant demands against her, and will use his office as trustee to wrong her.

She does not aver how he can do so, there being a co-trustee who is friendly to her and who has no demand against her.

Has the defendant made exorbitant or extortionate demands against the complainant?

We answer most emphatically, no.

If a contingent fee is to be entertained, you cannot apply to it any scale of measurement. It cannot be *extortionate* if agreed upon before the commencement of litigation and it cannot well be *exorbitant* when agreed upon beforehand by the parties themselves.

Although Mr. McPherson is entitled to make demands for services rendered in other matters than those for the recovery of square 312, he has in point of facts made demand only for those services, and this demand is the sole subject of controversy. Happily for Mr. McPherson this demand is for a fee proposed and named by herself before he came into the cause or was even mentioned or intended to be mentioned in connection with it and long before he was trustee; by reason whereof he cannot be subject to the charge of making and claiming an inordinate fee, think-

ing and hoping to exact its payment on account of his position as trustee. He says this fee was $5,000, contingent and restricted in its payment to a particular fund, and offered, as just stated, before he was spoken to in regard to the case. That he knew the rate of contingent fees, and that upon taking into consideration the enhanced value of the property to be recovered, and the net gain that would accrue to Mrs. Cox in case of his success, this amount of $5,000 was but a fair compensation. That he, with Mr. Carlisle, accepted this offer of Mrs. Cox, and undertook the litigation. That he and Mr. Carlisle consulted and acted together, and that they were to share the fee. When he engaged to do this work for the fee offered, he had in consideration the amount of work that might be required He contemplated action by the other side for injunctive relief against law proceeding, and for relief against forfeiture, and the chances of an appeal to the U. S. Supreme Court, which appeal might be reasonably supposed would be taken by the other side in case of their defeat in the lower court.

Mr. McPherson supports his testimony to this effect by that of Mr. Carlisle, and by all the circumstances possible. In bringing action for mesne profits, he includes a $5,000 fee. He lends her money pending the litigation amounting to upwards of $1,800. Mr. Carlisle lends her money amounting to nearly $400, according to Mrs. Cox's testimony. This without any security whatever. This was lent to her to pay taxes on this property, and to give her something whilst she was deprived of her rent. Is it to be supposed that these two gentlemen would lend a client $2,200 in order to maintain her during the litigation, if they were to receive the paltry sum of $2,500—$1,250 each?

Mrs. Cox admits that a fee was agreed to be paid; that the amount [whatever it was] was named by her and offered of her own will; that the fee was accepted by Mr. Mc-

Pherson and Mr. Carlisle before they undertook the litigation. That it was contingent upon success, and that the payment in case of success was restricted to the proceeds of the sale of the property. She denies that the amount was $5,000, but says it was $2,500.

Now, as to this fee, Mr. McPherson and Mr Carlisle, in their testimony, are very positive and have it clearly defined in their memory as to all its parts. Mrs. Cox, in her correspondence and in her testimony, in the strongest terms, contradicts the testimony of both these gentlemen. It is impossible to reconcile the testimony. Mrs. Cox prides herself upon her good memory. (See testimony, printed page 63.)

Shall we attribute discrepancies, in her testimony, to the infirmity of her memory? If a glaring inconsistency appears in her testimony respecting a particular item of this contract, for the payment of a contingent fee, what credit should be given to her testimony, respecting any part of the contract, wherein she is contradicted by two witnesses?

Such a case calls loudly for the application of the maxim, *falsum in uno, falsum in omnibus.*

Mrs. Cox, in her letter of March 25, 1873, says: "I distinctly remember the sum proposed, which was just half the amount you now claim, and was to be paid out of the proceeds of the sale of the property, as such proceeds shall be realized." See her letter to Messrs. C. and M., Record, p. ——.

Yet, on re-examination, when *asked*—

Had you not promised to pay them compensation for the recovery of the ground, as and when the same should be realized, *she answers:*

"I expected to pay $2,500 for the recovery of the rent and the square.

"Q. And not as the same should be realized in the sales made of the property.

"A. I did not so understand it."

Here she endeavors to import into the contract the fee for both the services for the recovery of the square and the rent; whereas, as the declaration in the rent suit shows, no rent was due when the bargain was made; and there was no reason to think the rent would ever have to be sued for, for it had been paid up to that time; and Angus & Lewis were specially anxious to preserve their lease.

It will undoubtedly be contended that the agreement of Mrs. Cox to give a contingent fee, whether of $5,000 or $2,500, was void because not reduced to writing; that it was an oral agreement not to be performed within one year from the making thereof, and hence made void by the Statute of Frauds.

The agreement, however, might have been possibly performed within one year, or a much less time. There was on the face thereof no mention of any time, and it in no wise purported to be an agreement which could not, by either or both parties thereto, or which was not to be, performed within a year. Hence the Statute of Frauds did not apply.

Chitty on Contracts, p. 75, and cases there cited.

20 Conn. R., p. 495, Clark, *vs.* Pendleton.

But whether or not the contract be void on this ground, Mr. McPherson in the original bill is admitted to be a creditor of Mrs. Cox for professional services rendered, and for the amount so due, whether the same is to be determined by a special contract or a *quantum meruit*, he has as attorney a lien on the bond in question.

III.

The bill should have been dismissed for want of proper parties, because prematurely filed and for multifariousness.

The bill at the instance of complainant alone, and in

her own right, seeks to divest the title to certain land held by the defendant jointly with another, under and by virtue of a deed of trust executed by Holden, Ford and King, and to extinguish the power of sale in said deed given, without making the other grantee of the estate and donee of the power a party.

Wilbur *vs.* Almy, 12 How., 191.

2 Story's Eq. Laws, sec. 1280.

The estate created by the limitations of the deed is a joint estate for the lives of the grantees, with a contingent remainder in fee to the survivor. (Barton's Conveyancing, page 152.)

How can this contingent remainder be destroyed unless the interest of both grantees be subjected to the operation of the decree?

It will not do to say that the deed was a mere security for the payment of a debt, and that the grantees thereunder were simply trustees, for a "trustee in a deed of trust for security is subject to the same rules that govern all trustees." "He may refuse the office, as no one is compelled to accept the trust, but if he once accepts the trust, or does any act, he cannot abandon it without the consent of all parties in interest or the decree of a court." He cannot resign even with the consent of all parties, so as to transfer his rights or powers, title or interest, as trustee to others or to co-trustees, unless the deed of trust makes special provisions therefor, without the decree of a court of equity.

Drane *vs.* Gunter, 19 Ala., 731.

Cruger *vs.* Halliday, 11 Paige, ch. R. C. 319.

Sergeant *vs.* Howe *et al.*, 21 Ill., 148.

Breedlove *vs.* Stump, 3 Yerg., p. 257.

The bill is multifarious as set up in the answer. (Rec., p. 28, fol. 53,) and for that reason should have been dismissed. Story's Eq. Pleadings, § 271. As there stated

Holden, Ford and King, who made the trust deed, and as grantees are parties to this suit, had no possible concern with the appellant's lien or Mrs. Cox's papers, and Carlisle, who was interested in that lien, had no possible interest in the trusteeship. His right to retain the bond depends entirely upon her debt to him and his co-partner. No misconduct of Mr. McPherson, as trustee, could forfeit his right to his security for past services as a lawyer. The entire absence or loss of his lien would not forfeit his right to continue as trustee.

The bill was prematurely filed. Nothing had occurred according to the proofs to cause the power of sale to be exercised. The duties of the trustee are to be exercised, as above said, only upon the default of the payment of the bond or interest, and when it shall become necessary to sell, it may be, that a stranger friendly to Mr. McPherson, or Mrs. Cox's executors or administrators, or the successors in her trust under her husband's will, will be the persons entitled to the bond, or it may be that Mr. McPherson will be dead and that Mr. Wilson as survivor, will have the sole power to sell. In any other event a foreclosure suit would accomplish the object of the bill.

Conclusion.

I. We submit that the conduct of the trustee has been amply vindicated, and that the decree of the court below removing him from the trust does him injustice; that it should be reversed and the bill as to that matter dismissed with costs

II. We submit that the appellant has established his lien upon the appellee's papers; that the decree as to the bond should be reversed, with directions to dismiss the bill unless the appellee shall offer to pay what she admits she promised to pay.

PHILLIPS, MAURY & PHILLIPS,
GEO. F. APPLEBY.

Supreme Court of the United States.

OCTOBER TERM, 1877,

JOHN D. McPHERSON,
Appellant,
vs.
MARY A. COX.

No. 199.

BRIEF OF FACTS.

This suit was brought by Mrs. Cox against Mr. McPherson to obtain from him a certain bond executed by C. W. King, S. Ford and C. H. Holden, upon which he and Mr. Carlisle claimed a lien for professional services as attorneys at law; and also to remove Mr. McPherson from the office of trustee under a deed of trust given to secure the payment of said bond. Mrs. Cox, in her bill, and amendment thereto, and two supplements, makes charges against Messrs. Carlisle & McPherson affecting their professional integrity, and against Mr. McPherson particularly in regard to his conduct as trustee.

A lawyer, eminent in his profession, and of extensive experience in the business of life, writing in a recent number of the North American Review, says that when one's integrity is thus attacked, "the party assailed had, as a rule, better remain quiet than attempt justification *by a simple denial.* He *must* go into detail, submit proofs and clear his skirts by an appeal to all the circumstances within reach; and then the chances are that the slanders will have raised such doubts concerning his integrity as to taint him in the estimation of some persons during the re-

mainder of his life." Nor. Am. Rev., Sept.–Oct., 1877, p. 212.

On the bringing of this suit, some years before the remarks quoted here, the assailed party instinctively felt the necessity of this course, and was not satisfied until every charge whether supported by evidence or not, was fully and conclusively proved to be false.

This brief is devoted to the facts alleged by the assailant and denied by the defendant.

Narrative.

I.

The following brief narrative furnishes the groundwork of the case and shows the relations between the parties out of which the controversy arose.

In October, 1864, Mrs. Mary A. Cox leased to T. Lewis and J. Angus, a square of ground, No. 312, in Washington city, for ten years, at a rent of $900 a year, with the right to purchase it at the end of the term for $15,000. Lewis and Angus were to pay taxes during the term, and to erect buildings on the ground to the value of $5,000, within two years.

Rec., pp. 55, 76.

In September, 1867, the ground had risen in value to nearly $40,000, and Mrs. Cox desired to recover it. The lessees had failed to erect the buildings, and she had been told that the failure was a forfeiture of the lease. She thereupon came to Mr. Carlisle, to engage his services to recover the land, and voluntarily, of her own will and accord, and without any suggestion from him, she offered him a fee contingent upon his services, to be paid out of the property when sold and proceeds realized.

Rec., pp. 51, 55, 76.

Mr. Carlisle consulted Mr. McPherson, and her offer, whatever it was, was accepted, categorically as made.

Both parties agree in this, but they differ as to the amount.
Rec., pp. 51, 55, 76.

II.

On examining the lease, however, it turned out the failure to erect buildings did not work a forfeiture, and moreover Mrs. Cox had continued to receive rent for several quarters after the failure occurred. But very soon after the retainer of Messrs. Carlisle & McPherson, a forfeiture occurred by failure to pay taxes, and an action of ejectment was commenced, which resulted in the recovery of the property. The proceedings were long delayed, however, by the lessees filing a bill in equity to enjoin the proceedings at law. Other actions were brought by Carlisle & McPherson for arrears of rent withheld while the dispute was in progress, and for mesne profits.
Rec., p. 76.

Mrs. Cox was put in possession in August, 1870. She promptly sold the square for $38,000, an advance on the previous sale of $23,000; for back rents she received $1250, and for mesne profits, $1500.

III.

The square was sold to C. W. King, S. Ford and C. H. Holden, on a credit of ten years, interest payable annually, and bought by them with the intention to erect blocks of houses thereon. They gave their bond for $38,000, secured by a deed of trust to John D. McPherson and Jesse B. Wilson. On the part of Mrs. Cox, she agreed that when any house was built and sold, she would accept the purchaesr's notes to a limited amount, and release a square foot of ground for each $1.50 so paid.

IV

In 1872, certain houses were built and sold, and the builders desired the release of the ground on which they stood.

Rec., pp. 55, 44.

Jas. T. Pike bought five of the houses, giving Ford & Holden for each house his three notes for $5,333.33, secured by a first mortgage on the houses, the residue of the price being paid in some trade.

Rec., p. 21.

Ford and Holden wished Mrs. Cox to take these notes, and release as much ground, including that the houses stood on, as the money would pay for. She refused unless they would pay $2,000 in money. After two weeks of negotiation it was agreed that Mrs. Cox should take only $13,000 in paper of $4333.33 on each house, and should have $2,000 in cash. The rest of the paper, $1,000 on each house, making $3,000, Ford and Holden sold at a heavy discount to raise the $2,000 for Mrs. Cox. J. D. McPherson and Jesse B. Wilson were the trustees, also in this deed of trust, made by Pike. The notes were bought by J. T. Benedict.

Rec., p. 45.

V.

It was agreed for the security of the notes that the houses should be kept insured, and as they were not entirely finished, it was necessary that a special agreement with the insurance company should be made to allow work to be done. By the deed of trust Jas. T. Pike, the purchaser of the houses enumerated, was to keep the houses insured and to pay taxes, and it was agreed that if he should fail to do so, the holder of the notes might pay insurance and taxes, and if Pike did not refund on demand, might sell the premises.

Deed, Rec., p. 21.

VI.

In November, 1872, after Mrs. Cox had received $15,000 in cash and notes, of the proceeds of sale of the square, besides several thousand dollars of interest, Mr. McPherson called her attention to the agreed fee, which he stated to be $5,000, and asked her to give her obligation for it. This she refused, saying that the agreement was for $2500 only. Mr. McPherson in reply denied this, and the matter so rested till the following spring, when Mr. McPherson, under date of March 20, called her attention to the fee, stating it at $5,000, but offering to make an abatement. To this Mrs. Cox replied, under the same date, that the amount was only $2,500, but promised to exert herself to pay what was justly due. P. 88. About the 1st of March, Mr. McPherson gave notice verbally to Mr. Ford that Mr. Carlisle and himself, had his bond in their possession and had a lien upon it for a fee of $5,000, and desired him to make no payments until their lien was satisfied. In her note of March 20, Mrs. Cox protested against this notice, whereupon Mr. McPherson informed Mr. Ford that the notice was not intended to apply to interest on the bond but only to the principal. About this time she sent to inquire of Mr. McPherson whether he was willing to retire from the trust, and he made no objection. R., p. 68. On May 23 she wrote requesting him to resigns, but as no trustee can resign, and she had counsel who could have told her so, and as the request was coupled with a threat, no notice was taken of it. And on the 11th day of June, she filed her bill of complaint. This was followed by an amendment, June 27, 1873, a supplement, March 17, 1874, and a second supplement, May 23, 1874, each containing some new complaint.

VII.

The first complaint is that Mr. McPherson prevented

Ford from paying interest on the bond. Bill, par. 12 to 17, Rec., pp. 2, 3.

The second complaint is that Ford had permitted taxes to accumulate upon certain lots in the square, and the same had been sold for taxes, and the time of redemption would soon expire, and Mr. McPherson had taken no steps to compel payment of taxes. Bill, par. 18, Rec., p. 3.

The third complaint is that the existence of the three notes sold to Benedict was concealed from her. Amendment, Rec., p. 8.

The fourth complaint is that Mr. McPherson had failed to cause the houses sold to Pike to be insured and taxes to be paid thereon. 1st Supplement, Rec., p. 20.

The fifth complaint is that J. E. Kendall, the holder of one of the Pike notes, had caused the trustees to advertise one of the houses for sale, and she had been compelled to purchase the note from Kendall, and to pay Kendall the expenses incurred, including exorbitant commissioners to the trustees. 2d Supplement, Rec., p. 30.

The sixth charge, which runs through most of the bill and its parts, is that Carlisle & McPherson endeavored to exact from her exorbitant fees. Rec., p. 4, 9, 19.

VIII.

First Charge.

Mrs. Cox, in the bill, charges that Mr. McPherson, without any right or pretense of right, knowing that the interest payable by Ford and Holden was Mrs. Cox's sole means of support, did cruelly, maliciously, and out of ill-will and dislike, notify Ford to pay her nothing more on account of such interest without consulting him, and the said Ford in obedience to said notice refused and still refuses to pay her arrears of interest to the amount of $800, and will continue to refuse if Mr. McPherson continues to be trustee; and she says that thereby Mr. McPherson has caused

her great distress, need, embarrassment, and humiliation, and has thrust himself between her and her debtor and withheld her daily bread and means of sustaining the lives of her children. Mr. McPherson in his answer admits that he did give notice to Mr. Ford that Carlisle & McPherson had a lien on the bond for $5,000, and that he must make no payment to her until the lien was satisfied; that, understanding, however, from Mrs. Cox that Mr. Ford construed this notice as applying to the interest as well as the principal, he informed Mr. Ford that the notice was not to stop the payment of interest. That this countermand was given prior to the filing of the bill; so that if Ford *still refused* to pay interest it was not in consequence of the notice.

Bill, Rec., pp. 3, 3.
Answer, Rec., p. 13.

The Evidence. To prove this charge Mrs. Cox called said Ford, who testified that as well as his memory served him the date when Mr. McPherson told him he could pay the interest was after the 11th of June, (the day the bill was filed,) and the notice not to pay was about three weeks before. The direct examination of Ford being unfinished at the close of the day he came in next day and testified that after Mr. McPherson's notice not to pay Mrs. Cox, and before the removal of the prohibition, he paid Mrs. Cox interest by a check dated March 27, 1873.

Rec., pp. 36, 38.

And on cross-examination, he said that he now thought the removal of the prohibition must have been prior to June; and this is certainly so; for, as he says, the removal of the prohibition took place three weeks after the first notice, and the first notice was given prior to March 20—since it is noticed in Mrs. Cox's note of that date, and in her bill filed June 11, as "three months ago."

Rec., p. 89.

And on being asked, on cross-examination, why, then, he had not paid the interest, Ford answers: "Because I had not the money, *and through the courtesy of Mrs. Cox*, and on account of the delinquency of others to me." Being asked when he last had talked with Mrs. Cox about the interest due her, he answered: "I can't distinctly remember. She visits me occasionally; sometimes I call on her. We meet on the street frequently. When the last allusion to interest was made I can't locate exactly."

Rec., p. 39.

On re-direct examination:

"Q. In response to question in cross-examination inquiring why certain interest, due by you to Mrs. Cox, is in arrear, you answers: "Because I had not the money, and through the courtesy of Mrs. Cox, and on account of the delinquencies of others to me." Please state, now, if Mrs. Cox has made any demand or demands for payment of the same, or part of the same, prior to the 29th day of November, 1873.

"A. I have no recollection of any special demand, though we have frequently talked over the matter, and I have been very anxious to settle with her."

REMARKS.

The gist of this charge is that Ford's refusal to pay interest was due to Mr. McPherson's prohibition, and that the refusal would continue so long as Mr. McPherson continued to be trustee; and that by Mr. McPherson's act Mrs. Cox was humiliated and distressed; and that Mr. McPherson required her debtors to defraud and distress her; and that Mr. McPherson withheld her daily bread, and the means of sustaining the life of her children.

There is no testimony that Ford ever withheld a dollar of interest on account of the notice given by McPherson; but, to the contrary, he testifies that he paid interest, not-

withstanding the notice—showing, in fact, either that he never construed the notice to apply to the interest, or that he disregarded it—in either case, that the notice was not the cause of his refusal to pay interest. But he goes further; and being asked expressly and directly why he had not paid interest, he says his failure to pay was in consequence of his own embarrassments; and, more than all, "*by the courtesy of Mrs. Cox!*"

A feeble pretense is set up that the interest Mrs. Cox indulged Mr. Ford in not paying, was not the interest she accused Mr. McPherson of stopping; but this pretense is wholly contrary to the evidence. Mr. Ford is interrogated by Mrs. Cox as to the stoppage of interest due in June, 1873—the interest spoken of in the bill: He answers as to that, and is cross-examined, "You speak of *certain interest* to her as being in arrear; please state why *it* is in arrear;" and to this he answers, "because I had not the money, and *through the courtesy of Mrs. Cox.*"

IX.

Second Charge.

The next charge is that Ford has suffered the taxes to accumulate upon five of the lots, and the same have been sold at tax sale, and the time of redemption will soon expire; yet the said McPherson has taken no steps to compel payment of taxes, but has, in this, shamefully neglected his duty as trustee under the deed of trust which is exhibited. Rec., pp. 3, 5.

The answer of Mr. McPherson simply says that no such duty as that of looking after taxes is imposed upon him by the deed of trust, or in any other way.

Rec., pp. 13, 14.

On reference to the deed, it is seen that the trustees take the title "upon the trusts thereinafter declared," and "for no other purposes whatever;" and the trusts are to release parts of the property whenever paid for; and

if the purchaser fails to make his payments, then to sell the property at auction. Those are the only purposes of the trust declared in the deed, and, as already noticed, the deed expressly declares that the trust is for no purposes except those declared. It is obvious, therefore, that the trustees were absolutely without any authority "to compel payment of said taxes"—the failure to do which is charged as a shameful neglect of duty.

Rec., p. 16.

It ought to be noticed that while Jesse B. Wilson and Mr. McPherson are constituted joint trustees by the same deed and with the same joint duties, and it was just as incumbent upon Wilson as upon McPherson to compel payment of taxes, Mrs. Cox has not a word of blame for Mr. Wilson.

The deed of trust—such as is here spoken of—is a security in universal use in this District, and the effect of it is as well understood as that of a promissory note. And it is perfectly well settled, understood and known that the only things the trustee is ever called on to do, by deeds of the kind in question, is to sell when properly required by the creditor, or to release when properly required by the debtor.

The Third Charge

is found in an amendment to the bill (Rec., p. 8,) in which Mrs. Cox says that Ford being about to sell two houses, built upon the ground covered by the deed of trust, *McPherson* advised her to release the same, *assuring her* that she should be paid $2,000 in money (which was paid), and have the notes of the purchasers to the amount of $13,000, secured by a first mortgage on three of the lots released; and upon such assurances she made the release, and received the money and notes; that she has since learned that at the time, and with the knowledge of Mr. McPherson, and *kept secret from her*, three

other notes were executed for $1,000 each, all payable a year before any one of those given her is due, and all secured by the mortgage or deed of trust taken by Mr. McPherson to himself, or himself and his co-trustee, to secure the notes made and delivered to her, and under which *she was assured by him* that she would have the first lien on said lots which are charged with the payment of her notes, and it now appears, of the other three, of which she knew nothing.

Mr. McPherson answers as follows:

"It is alleged in an amendment to the bill, that after I had advised the complainant to release her lien on five of the lots, I advised her to release six additional lots of the same which Ford had sold, or was about to sell, and to induce her to make such release, assured her that she should be paid $2,000 in money, and have the notes of the purchasers, secured by first mortgage on three of the lots released, and that thereupon she made the release, and received the money and notes; but that with my knowledge, and kept secret from her, three other notes were executed for $1,000 each, payable a year earlier than those given to her, and were secured by the same deed of trust upon the said lots, and are now held by one Benedict.

In answer, I say that the allegation is utterly untrue, in so far as it represents me as holding out inducements or making representations to her. She made her own bargains, and was fully competent to do so. I spent a vast deal of valuable time in hearing propositions and advising her about them, but she determined upon everything herself. And, secondly, I say that the transaction mentioned in the amendment is the same referred to in the body of the bill. There was only one transaction in which she received $2,000 in money. In that affair, Ford and Holden wished Mrs. Cox to take certain notes secured on three houses and release two others absolutely. She re-

fused, unless $2,000 was paid in cash. Ford and Holden then agreed with Benedict that he would buy three of the notes, and thus enable them to meet Mrs. Cox's terms. Accordingly, Ford, Holden and Benedict met Mrs. Cox at my office. The notes were sold and delivered to him in her presence, and the money instantly passed to her. At the moment of making the transfer a dispute arose, I think about the amount of discount, which was claimed by Benedict, and which Ford and Holden thought excessive. The matter was discussed at most wearisome length, so much so that I gave notice to the disputants if they did not soon conclude I should close the office. It is incredible that Mrs. Cox should not have understood what was passing before her eyes and discussed in her hearing for a full hour or more, and which resulted in the receipt by her of $2,000, which she saw Benedict pay for the notes which she saw him take. That I concealed anything from her, or accepted any trust of which she was ignorant, is utterly untrue. Everything I did was simply to carry into effect bargains made by herself, and this I did to the best of my ability.

Rec., p. 14.

Three facts are here in issue:

1. That *Mr. McPherson* "assured her she should be paid $2,000 in money, and have notes of the purchasers to the amount of $13,000, secured by a first mortgage on them—the lots released.

2. That besides the notes for $13,000 secured on the lots, there were also secured on the lots "other three, *of which she knew nothing.*"

3. That the existence of these three notes was "kept secret from her."

(1). Did Mr. McPherson represent to Mrs. Cox what she was to have?

The discussion of this question is rendered unnecessary

by the testimony of Mrs. Cox. She takes back that part of the charge. She says:

"I believe one other proposition was made, which I didn't accept. I saw Mr. McPherson afterwards; and he said they had proposed to pay me my interest and $2,000 on the principal—as they considered my releasing the house a great favor, and security on the house—as I understood it. I was to have $2,000 in money (interest); $2,000 on the ground of the principal money due me; $13,000 in notes and security on the houses. In justice to Mr. McPherson, I say he did not tell me this; but it was Mr. Holden. Mr. McPherson assured me it was a safe business transaction."

Rec., p. 56.

But did she know there were any other notes than those she got—those due in three, four, five and six years, four on each house? There were fifteen notes, five on each house, due in two, three, four, five and six years. She got twelve notes. The two year notes Benedict had bought.

During the negotiation, Mrs. Cox wrote Carlsle & McPherson:

"Mr. Holden has just left and tells me you approve and think perfectly safe his offer to pay, in addition to his interest, $2300; $2000 cash, and all expenses for papers necessary to all parties, taxes, insurance, &c. If such is your understanding of the matter, I am willing to affix my name if I am perfectly safe and secure; of which you and Mr. C. must be the judge. I am too unwell to see you personally.

"Yours, truly,
"M. A. COX.

"Friday morning." Rec., p.

Mrs. Cox, then, knew that Holden's proposition involved some danger. What danger? There was no danger in

her receiving the $2000. Where, then, did the danger lie? It lay in the mode by which Holden was to raise the $2000; by selling three of the first mortgage notes secured by the same deed that secured the twelve notes Mrs. Cox was to take. That was the only danger, and if she knew or thought there was any danger, she knew of that proposed sale.

To prove her ignorance of the existence of any other notes she calls Benedict and Ford to prove that when she was informed that three notes secured on the same property fell due before hers, she expressed surprise. As this occurred after she had filed the bill against Mr. McPherson, and when she was seeking to incriminate him, any expression from her *post litem motam* is worthless against her opponent.

But what was she surprised at? Here is Benedict's testimony: Rec., p. 42.

"Q. State what passed between you and Mary A. Cox in regard to said three notes, or one or more of them, in the summer of 1873, and whether before or after the filing of the bill herein, namely, 11th of June, 1873, and whether she did or did not know that you held one or more of said notes before you conversed with or wrote to her on the subject, about that time, and whether she was not then, for the first time, informed of the existence of such notes secured by the deed of trust that secured those payable to her?

"A. Mrs. Cox called at my office in reference to some interest money due her from Mr. Pike, (Mr. James T.) I conversed with Mrs. Cox at the time in regard to certain notes that she held on this same property. In a day or two after she called at my office, I visited her at her house, and paid her some interest money due her for Mr. James T. Pike. In conversation with her I asked her about two notes she held, due about the same time as these three

notes before mentioned. She informed me that she had not any notes due at that time. I was very much surprised, as I thought she had at that time two notes of $1,000; that these notes were given to secure the payment on five houses on Eleventh street instead of three. She informed me that she had not, and produced the notes that she held, and they were due in three, four, five, and six years instead of two years. She then explained to me that she had only received the notes for three houses instead of five. That was all the conversation I had with her in regard to the notes that I recollect now. She said that she had the first notes on those houses.

"Q. You state in your last answer that Mrs. Cox produced the notes that she held; how many of those notes were so produced by her?

"A. I think twelve.

"Q. State, if you know, or can say, anything more or further in regard to the matters above inquired of, or to said three notes, that may be material in this case, or that can be of benefit or advantage to either party?

"A. I can only say that Mrs. Cox was very much surprised to know that *she did not hold the first notes* due on this property. *She insisted that the notes I purchased were the notes due in six years instead of two*, or whatever time the last notes were given. I recollect of nothing more in the matter."

Here is Ford's testimony: Rec., p. 28.

"It is proper for me further to state that in a conversation held with Mrs. Cox some time during the summer, I suggested that the first notes named in the trust would mature on the coming 1st of January, 1874. *She seemed to think not*, and afterwards, subsequent to that occasion, told me that she had seen Mr. Benedict, and seemed surprised at the fact that she did not have the first notes. I believe that is all."

Now she was not surprised when Ford told her of the other notes, nor even when he told her he thought they came due before hers. She was not surprised till she had seen Benedict and found out that what Ford said was true. And this agrees exactly with Benedict's testimony, who says she was surprised to find she did not hold the first notes, and insisted that the notes he purchased were those due in six years instead of those due in two years. Does not this show that she knew there were other notes?

So much for the evidence on her side.

But these witnesses of hers not only failed to support her case, but they helped to *disprove* it. They testified that after the negotiations had been going on for some two weeks, the parties met at Mr. McPherson's office, where the papers were executed and exchanged. Ford and Holden conveying the houses to Pike, Pike giving his fifteen notes to Ford and Holden, and a deed of trust to secure them. Mrs. Cox releasing the ground so conveyed and receiving from Ford and Holden $2,000 in money, [of principal, besides a large sum of interest,] and $13,000 in twelve of Pike's notes, the other three being then and there sold by Ford and Holden to Benedict in order to raise the cash that was paid to Mrs. Cox.

To prove the concealment of the three notes from her, she examines Benedict as follows: Rec., p. 40.

* * * * * *

"Q. If you were present with Charles H. Holden and Samuel Ford, at the office of John D. McPherson, esq., at the time spoken of by him at pages 6 and 7 (section 21) of his printed answer herein, state particularly the whole and all of the details of the transaction, and particularly whether it was then and there, with the knowledge of the said Mary A. Cox, that the three notes mentioned therein, were delivered to you?

A. I was present on the 6th of January, 1872, at the office of Mr. McPherson when the transaction which was

closed between Mr. Ford, Holden and Pike, for the purchase of the houses on Eleventh street, which I presume is in the square mentioned. At the request of Mr. Holden, Mr. Storrs and myself raised a certain amount of money to be paid to Mr. Holden, he delivering to us certain notes secured on the property on Eleventh street. Mr. Storrs paid over the money and received the notes. I say on the 6th of January, because it was the first Saturday in January when we closed the bargain. So far as Mrs. Cox was concerned she had nothing to do with either Mr. Storrs or myself in delivering those notes. I did not know Mrs. Cox at the time, and had no conversation with her at the time at all.

Q. With whom did you make the arrangement that those three notes should be secured by the deed of trust; if with John D. McPherson, esq., state when, and what passed between you and him in regard to it?

A. My whole arrangement was made with Charles H. Holden, he to deliver to me the three notes which he mentioned.

Q. State whether it was or was not known to the said Mary A. Cox, that the said three notes were secured by the deed of trust made to secure those made to her, or for her benefit, and whether she did, or did not know that they were to fall due a year sooner than any of those given to her.

A. What Mrs. Cox knew about this I do not know, as I had nothing to do with her business.

Q. Who delivered to you the notes, and to whom did you pay the money?

A. The notes were not delivered to me, I did not pay the money. The notes were delivered to Mr. Storrs by Mr. Ford, I think, or Mr. Holden. Mr. Holden wished us to raise a certain amount of money for him; we did so. Mr. Storrs had the money with him that we raised, I think it was about $4,000; Mr. Holden left Mr. Storrs certain notes as collateral security to raise the money; when Mr.

Storrs had the money we were to meet at Mr. McPherson's office to pay over the money and receive these notes. We were notified by Mr. Holden that everything was ready for the transfer of the money or the notes; we met there by agreement, in the afternoon of the day mentioned; Mr. McPherson made the remark that he hoped we would settle it up that afternoon, as he had had a great deal of trouble in being kept from his home, we not coming to time. After we had assembled there was some little preliminaries to be settled between Holden, Ford, Storrs and myself. Mr. McPherson said he would send for Mrs. Cox, and have that matter settled, that he had given or sent a paper to her to be executed, which she had mislaid, that she had been at his office and was then over at her home; and he would send to her to bring the paper that he had sent her to execute. After waiting some time, Mr. McPherson said that he could write another paper and have it executed while she was hunting for that one. She did come over to Mr. McPherson's office, and Mr. Storrs and myself did settle with Mr. Holden and Ford, he (Mr. Storrs,) holding the money and paying the notes; Mrs. Cox having nothing to do with us, not speaking to us in the matter. Mr. Storrs wrote the notes, Mr. Pike took the notes after they were written and signed them, Holden and Ford took the notes from the desk to another and endorsed them, returned them to the desk where they were first written, Mr. Storrs laid them out in series, Mr. Ford took the notes, delivered them to Mr. Storrs, (the three notes $1,000 each), Mr. Storrs paid the money for the notes. That ended our transaction in the business at Mr. McPherson's office."

Cross-examination; Rec., p. 43,

* * * * * *

"Q. How long, or about how long, were you detained in Mr. McPherson's office at the time of this transaction?

A. I should judge about three hours.

Q. Was Mrs. Cox present during the time?

A. Part of the time she was.

Q. Was she present at any part of the time during the discussion of this discount?

A. She was.

Q. During any of the time that you were in Mr. McPherson's office, was there a dicussion between Mr. Ford and Mr. Holden respecting the discount mentioned?

A. Not in my presence; I presume they had a discussion as they went aside and had a private conversation; they returned to the table where we had the money; Mr. Storrs had the money; said they had settled their business and we were to go on.

Q. About how long was Mrs. Cox present in Mr. McPherson's office when you were there?

A. I have stated that we were present, as near as I can recollect, for about three hours; I think Mrs. Cox came to Mr. McPherson's office, he having sent for her about one hour after we arrived there, which, if the time that we were there is correct, she must have been there about two hours."

Ford being similarly questioned says: Rec., p. 37.

" A. I was present at the time, but do not *know* whether Mrs. Cox knew of the matter or not. I presume that she did. Mrs. Cox was there. I met there by appointment, to transfer some of the property. The appointment was made by Mr. Holden; there was a dispute relative to the amount of discount which was to be taken off of the notes, which lasted some time, and which was settled by Holden agreeing to assume the amount in dispute. Mrs. Cox was in and out of the two office rooms; there was no secrecy in the matter; there was no secrecy that I was aware of. I received a sum of money from Benedict or Storrs, and paid the amount of $2,000, also $2,253.66 interest, also twelve

notes of James T. Pike, amounting to $13,000, which were secured on three houses."

The evidence failing to prove any concealment by Mr. McPherson, but on the contrary leaving it quite certain that if she was present, at a transaction which was delayed two hours, by a controversy about the sale of the three notes, she must have known something about them. Mrs. Cox offers her own testimony to prove the charge which her witnesses had failed to substantiate.

She testifies:

"On the 5th of January, 1873, I received a message from Mr. McPherson to come to his office and bring the release that he had given me besides; I could not find it, and when I got over there he had written another which I did sign. I was detained at home before I could go, looking for this release. I found Mr. McPherson sitting at his table in the front office busy with something; I don't know what. *I took my seat on his left, finding a chair there, and never rose from that chair until I was ready to come home.* I heard voices in Mr. McPherson's back office, looking into Mr. Carlisle's back yard; and as they walked to and fro, resting for a moment on the sill between the two rooms, I recognized Holden and Ford, the owners of the property; Pike, to whom they had sold the houses, but a stranger to me; a Mr. Storrs, a claim agent, and a person who I afterwards learned was a Colonel Benedict. While they were in there, there was a murmur of voices; I turned to Mr. McPherson and said, "They seem to be jawing." Mr. McPherson, I thought rather tartly, 'It is no concern of ours.' After a while all of them came out, they bowed to me, and after talking a little with themselves they all left, with the exception of Mr. Ford, who, advancing to the table where Mr. McPherson was sitting, laid down a bundle of bank notes and

counted them out to Mr. McPherson. He (Mr. McPherson) then recounted them, and looking up at him said, 'It is all right, $4,000.' Mr. Ford then said, 'What do I owe you, sir?' and I think I heard, '$45, sir.' Mr. McPherson then turned to me and said, 'Well, here is your money at last,' mentioning the sum. I then said, 'Mr. McPherson, count out for yourself $1,000; you know I promised to pay you this $1,000 if Holden and Ford paid me. I still owe you $140, but as I am terribly in debt, you must wait a little while." I have since paid this $140, and this was all borrowed money that he had loaned me. In the meantime Mr. Ford had left. When Mr. McPherson counted out the money to me, he deducted, in Mr. Frod's favor, the interest on $445, the taxes for 1870, which Ford was to pay out of the ground. Then Mr. McPherson handed me an envelope containing notes. He (Mr. McPherson) said, 'These are yours, twelve notes, calling for $13,000, due in two, three, four, and five years.' He then offered to see me safe home. When I got home, I gave the envelope to my daughter; this was Saturday night, and on Monday morning I opened the envelope, looked at the notes for the first time, and observed that they were drawn in favor of Holden and Ford, and endorsed by Mr. Pike, and not due in two, three, four, and five years, but in three, four, five, and six. In a few days I went over to Mr. McPherson's office; he was busily engaged in writing; I said, "Mr. McPherson, these notes are not due in two, three, four, and five years, but in three, four, five, and six." Without lifting his head, he simply said, "Is that so?" It was a matter of no moment to me, the discrepancy of time, because I expected to live on the interest, for the idea never entered my head that there was any wrong-doing about the notes."

Rec., p. 56.

Cross-Examination:

* * * * * *

"Int. Where were the notes, on which Pike paid this intesert, drawn by Mr. Pike?

A. I really don't know but I presume at Mr. McPherson's office.

Int. To whom were they made payable?

A. To Holden & Ford.

Int. Did you see Holden & Ford endorse them?

A. I did not.

Int. Did you see Holden & Ford endorse any notes in Mr. McPherson's office at that time spoken of?

A. I did not.

Int. Did you see Mr. Pike sign any notes?

A. I did not.

Int. Did you see Mr. Storr draw any notes to be signed by Mr. Pike at Mr. McPherson's office at that time spoken of?

A. I did not."

Rec. p. 64.

* * * * * * * *

Int. Have you, in your direct examination, stated all that occured in your presence in Mr. McPherson's office on that occasion?

A. To the best of my belief and recollection, I have."

"Int. Did any of the parties spoken of by you as being there, walk to and fro in both front and back office?

A. They did not; they come no fuather than the sill of the door.

Int. Where was Mr. McPherson?

A. Sitting at the table when I went in, attending to his business; he was sitting in the office leading in from the street.

Int. Who was in that office room besides Mr. McPherson when you when you went there?

A. I do not recollect.

Int. Was there anybody?

A. I don't remember.

Rec. p. 65.

The force of this testimony lies in her allegation that the writing, signing, endorsing and delivery of the notes related by the witness, took place in the back office, while she and Mr. McPherson sat in the front office.

To contradict her, her witnesses, Benedict, Ford and Pike, were re-called, and also Storrs, who was mentioned as being there.

And here is what they say on the point, whether the writing, signing and endorsement of the fifteen notes did or did not take place in the front office where Mrs. Cox was.

"James T. Pike, a witness of lawful age, a resident of Washington city, produced, sworn, and examined, by and for the defendant, deposes and says as follows, to wit:

"I have been a witness in this case before.

"Int. Please state in which of the two office rooms, occupied by John D. McPherson, you executed the promissory notes made by you in favor of Holden and Ford, and as to which you have heretofore testified.

"A. *In the front room.*

"Int. In which of the two rooms referred to were the said notes endorsed by Holden and Ford.

"A. To the best of my recollection, *in the same room*, and at the same desk where I affixed my signature.

"Cross-examination waived."

Rec., p. 71.

"*Deposition of C. Storrs.*

Rec., p. 71.

"Whereupon C. Storrs, a witness of lawful age, a resident of Washington city, produced, sworn and examined by and for the defendant, deposes and says as follows, to wit:

"I know the parties to this suit.

"Int. Please state whether you were in Mr. McPherson's law offices on or about January 5, 1872?

"A. I was.

"Int. Who else were there at that time?

"A. Mr. Samuel Ford, Mr. Charles Holden, Mr. McPherson, Mr. Benedict, Mr. Pike and Mrs. Cox. I don't remember of any other persons.

"Int. State briefly the object of their assembling there.

"A. The object was to make some payment to Mrs. Cox. At the request of Mr. Holden, I had borrowed some money on real estate paper furnished by Mr. Holden, and was requested by him to bring it here, and retain until directed to deliver it. I held this money, and paid it over on the direction of Messrs. Holden and Ford. There were certain notes in blank which I filled; they were signed by Mr. James T. Pike, and endorsed by Messrs. Holden and Ford. When they were so signed and endorsed, I laid the money on the table, in the front office, where these notes were lying.

"Int. In what office room was the table situated on which you laid the money, and at which these notes were signed and endorsed?

"A. *In the front room of Mr. McPherson's offices.*"

"Cross-examination by Mr. Pike: Rec., p. 72.

"Cross-int. Were there not some negotiations carried on in the back rooms of said offices relative to the business of which you had assembled to consummate; if yea,

state if you were present at those negotiations, what they were, and in what they resulted; also, who were present thereat?

"A. Mr. Holden and Mr. Ford were endeavoring to arrange some matters relative to the business for which we had assembled. Sometimes they were in the front room and sometimes in the back room. I was not a party to those matters. When the money was paid, I deducted the commissions, and that was all I had to do with it. Beyond the matter of deducting the commissions and paying the money, I was not a party. I can only state that I know, only in a general way, what those negotiations were; I do not know the details. I was in the back room most of the time. *My recollection is that most of the conversation took place in the front room.* Messrs. Holden and Ford were the persons present, principally; I think Mr. Benedict was also present part of the time. I have no personal knowledge of what they were endeavoring to come at.

"Int. Were you present at the execution of the notes by Mr. James T. Pike, and of their endorsement by Holden and Ford?

"A. I think I saw them signed and endorsed.

"Int. In which room were they so signed and endorsed?

"A. *In the front room.*

"Int. Were they so signed and endorsed before or after the negotiations were had in the back room?

"A. I think it was after the commencement of the conversation, which was a long one. They had reached, I suppose, some conclusion, or something satisfactory to them, when *they requested me to fill the notes.* I don't wish to be understood as saying I have personal knowledge of their conversation or transactions; but was requested to fill the notes.

"Int. Do you mean by the expression "fill the notes"

that they were written off by you for the signatures of the persons who were to execute and endorse them?

"A. They were printed blanks, and I filled in the dates and the amounts.

"Int. Was Mrs. Cox at the office when you arrived there?

"A. She was not.

"Int. How long afterwards was it when she arrived?

"A. I am unable to state the exact time; she was sent for, pretty soon after we came here, by Mr. McPherson; it might have been an hour or an hour and a half. I would not undertake to state the exact time."

Rec., p. 72.

* * * * * * * *

"Int. Who was present in the front room when you put it on the table?

"A. My recollection is that all the persons I have named as being present were in the front room; this includes Mrs. Cox. Mr. McPherson was anxious to close his office. He said: 'Gentlemen, you must bring this matter to a close, as I must go home.'"

"Re-cross:

"I think this remark was made by Mr. McPherson just before the business was closed up—between 3 and 4. As an explanation to that, it might be stated that Mr. McPherson stated he wished to leave on the train at a certain hour, then drawing near. I think the remark was made about a half hour before we left the office."

Rec. p. 73.

"*Deposition of James T. Benedict.*

"James T. Benedict, a witness, of lawful age, a resident of Washington city, produced, sworn and examined

by and for the defendant, deposes and says as follows, to wit:

"I am the same person who has testified in this case before, at instance of complainant.

"Int. Where were the notes executed by Pike and endorsed by Holden and Ford, of which you have heretofore testified. I mean in which room of Mr. McPherson's office?

"A. *In the first room.*

"Int. Was it done before or after the conversation in the back room between Holden and Ford touching the discount?

"A. After.

"Int. Do you know what that conversation between Holden and Ford was?

"A. Only from what Mr. Holden told me.

"Int. You have heretofore spoken about these notes of Pike's being laid on the table in a series; please state in what room these notes were placed in a series on a table?

"A. *In the front room of Mr. McPherson's office in which they were drawn.*

"Int. Was Mrs. Cox present when Pike executed these notes, when Holden and Ford endorsed them, and when they were so laid on the table?

"A. *She was present, but I don't know in what room.*

"Int. In which room did Mr. Storrs pay over the money?

"A. *In the front room.*

"Int. In which room was Mrs. Cox when the money was paid over?

"A. According to the best of my recollection, Mrs. Cox was sitting on *the sofa in the front room.*

"Int. Where were you most of that evening?

"A. *In the front room.*

"Int. Were you at Mr. McPherson's office when Mrs. Cox came; if so, in what room?

"A. *I was; I was in the front room.*

"Int. Were you in the back room at all; if so, how long, and for how long, and for what purpose?

"A. I was there for a short time; I went in to notify Mr. Holden that he and Mr. Ford must settle the matter, as I had waited as long as I could. Soon after that Mr. Holden told me the matter was settled and to go on and fix the notes, and we did so."

Rec., p. 73.

"*Deposition of Samuel Ford.*

"Samuel Ford, a witness of lawful age, a resident of Washington city, produced, sworn and examined by and for the defendant, deposes and says as follows, to wit:

"I am the same witness who has testified heretofore in this cause at instance of complainant.

"Int. State in which of the two rooms, occupied by Mr. McPherson for law offices, did the transaction of signing the notes and endorsing the same and paying over the money for the same, as to which you testified, take place?

"A. *In the front office.*

"Int How much money, on that occasion, did you pay to Mr. McPherson?

"A. My memorandum book for 1872 shows that I paid $3,307.73 to Mrs. Cox, and I paid Pike for stamps $40, and McPherson $13. I had previously paid Mrs. Cox $1,000 on account.

"Cross-examination waived."

Rec., p. 74.

We submit that the evidence proves beyond doubt or question that the whole charge is utterly without foundation.

XI.

The Fourth Charge

is in these words: "That by each of the said three deeds of conveyance in trust, so aforesaid executed by the said James T. Pike and wife to the said John D. McPherson and Jesse B. Wilson, the said James T. Pike covenanted with the said trustees, that all taxes on the lot of land thereby conveyed should be paid, and the building thereon kept insured during the continuance of the trust, in some good and responsible fire insurance company or companies to the satisfaction of the said trustees; but the said covenants have not been kept, the taxes have not been paid, and after the exhibiting of the said bill, the plaintiff found that the buildings on said three lots had not been and were not insured; and the said John D. McPherson, declaring that it was not his business to see that the said buildings were kept insured, and the said James T. Pike, alleging to the plaintiff that he had placed in the hands of the said John D. McPherson one hundred and fifty dollars, with which to keep said houses insured, she has been compelled, during the last six months, herself to insure and keep insured the same, with an insurance company in the city of Washington."

Rec., p. 20.

Besides the terms of the deed as cited it contains the following provisions:

"And further, that in case the said James T. Pike, his heirs or assigns, shall fail to pay taxes or to keep said property so insured, then the taxes may be paid and the property be insured for the amount aforesaid by the legal holder of the note before mentioned; and the amount of taxes and premium paid shall be considered a part of the expenses of said note secured hereby, in default of payment of which on demand the said parties of the second

part shall have power to sell said property hereby conveyed as aforesaid, and shall dispose of the proceeds of sale as hereinbefore provided."

Rec., p. 23.

The answer of Mr. McPherson points out that if Pike failed to pay insurance and taxes the remedy was for the holder of the notes to do so, and then, if not repaid on demand, to have the property sold. Rec., p. 27. The trusts in this deed, like those in the last, are expressly declared, and all others expressly excluded; they are to sell or release. There is no duty imposed on them to sue for breach of any covenant of Pike of their own motion and without any request from the *cestui que trust*, who had the readier, and, indeed, the only effectual remedy of paying taxes and insurance, and having the property sold to reimburse her. The action, in advance of any damage or any payment, could have resulted only in nominal damages. Mrs. Cox, without requesting an action to be brought, paid, she says, the taxes and insurance, (Rec., p. —,) for her own security, and had her lien on the property for reimbursement. But it is insinuated that Pike had placed in Mr. McPherson's hands $150 to pay insurance.

I say insinuated, not averred. The bill does not say Pike did place the money in Mr. McPherson's hands. It does not say that Pike said he had done so. The expression is: "And the said James T. Pike, alleging to the plaintiff that he had placed in the hands of the said John D. McPherson $150 with which to keep said house insured, she has been compelled," &c. Rec., p. 20.

In his answer Mr. McPherson denies that Pike ever placed in his hands the sum of $150 or any other sum for insurance, Rec., p. 28.

Mrs. Cox made no attempt to prove the insinuation, and although Pike was twice examined in the cause, never asked him a question on the subject.

But was the property insured? Mr. McPherson says in his answer:

"At the time of the execution of the deeds of trust, the property was already insured, and the polices had some nine or ten months to run; and it being suggested by the complainant to this defendant that it would be well to inquire into the standing of the companies which had issued the policies, she undertook to do so herself, and to the best of this defendant's recollection and belief the policies were placed in her hands on that occasion. What was the result of the inquiries this defendant does not remember with any clearness, but knows that it did not result in his being called on to effect an insurance; nor does he remember that he was ever called on to do anything in the premises. He has never been furnished with money to keep the premises insured, and it was not his duty to insure them."

Rec., p. 27.

To the contrary of this Mrs. Cox testifies:

"After the Chicago fire I went to Mr. McPherson's office and inquired if he had looked at the policies that Holden and Ford gave him when they commenced to build first, and if they were endangered by fire; there was an insurance, I think, that they called a builder's rick; I had nothing to do with it at all; I asked Mr. McPherson if he had better not look; he said he had not; he was very much engaged, and I said 'give them to me, and I will ascertain whether they are good, bad or indifferent;' I went up to Mr. Hansom's office, on Seventh street, who keeps an insurance office, and got him to examine; he told me three or four of the companies had broken and two had not; I gave that information to Mr. McPherson, and some time after that Colonel Holden told me that they transferred these insurances to some other company; I do not believe there was any further insurance upon those houses by the builders themselves; I meant by 'having

nothing to do with them;" that I had nothing to do with having them insured or looking after them; it was an act of kindness on my part.

"Int. Do you know in what other companies the insurance was effected?

"A. I don't know one of them or anything about them.

"Int. How then do you know that they have not been kept insured?

"A. My general disbelief, and the promises made by the parties, who said they would turn over the insurance to other companies.

"Int. Disbelief of what parties?

"A. Holden and Ford.

"Int. Was not James T. Pike, at the time you are speaking of, bound to insure the houses?

"A. I presume he was; the deed of trust will show that."

Rec., p. 62.

* * * * * * * *

"Int. You then don't know what time the houses were insured for in the companies to which the insurance was transferred?

'A. They (the houses) had nothing to do with the first insurance; I refer to the houses sold to Pike; the builder's risk had nothing to do with them; they were insured long before Pike bought them by the builders themselves; *the houses sold to Pike were never insured at all;* they were covered part of the time *by the builder's risk* before Pike purchased them."

Rec., p. 64.

Having thus on oath contradicted Mr. McPherson's answer upon two points: 1st. Having denied that the houses bought by Pike, and on which the notes were secured, were insured when the deed was made; and 2d.

Having denied that the policies she got from Mr. McPherson were policies of insurance on the said houses, Mr. Pratt, an insurance agent, was called, and testified as follows:

[Note that the houses stood on lots 26, 27 and 28. Rec., p. 64.]

"Frederick W. Pratt, a witness of lawful age, a resident of Washington city, produced, sworn and examined by and for the defendant, deposes and says as follows, to wit:

"The houses upon lots 26, 27 and 28, in square 312, were insured in the office of A. S. Pratt & Son, of which firm I am a member, conducting a general insurance business. The building on lot 26 was insured by the Phœnix Company by a policy dated October 19, 1871, for $3,500, having one year to run. The building on lot 27 was insured by the Insurance Company of North America, of Philadelphia, October 4, 1871, for the same amount, and having one year to run. The building on lot 28 was insured in the Andes Insurance Company, of Cincinnati, on the 16th of November, 1871, for the same amount, having a year to run. All the policies were issued for a year with the privilege of finishing, which is called a builder's risk, for which an additional premium was paid, the privilege expiring in one month from date of issue, renewable from month to month by payment of the same monthly premium. The Phœnix Company is a strong, reliable company; it paid its losses promptly in the great fires of Boston and Chicago, and is still doing business. The North American is the oldest stock company in the United States, and is strong and reliable, and has assets amounting to over $3,000,000. It is still doing business. The Andes Company paid all its losses and stopped doing business, reinsuring its risks in another company; the policy holders were protected, not losing anything. The policies in the

Phœnix and Andes were cancelled May 17, 1872. That in the North American ran to its full term.

"FRED'K W. PRATT."

Rec., p. 83.

This deposition establishes two material facts denied by Mrs. Cox:

1. That the houses, when the deed of trust was made, were insured in good and reliable companies.

2. That there being a policy on each house which contained both the general insurance and the builders' risk, and she admitting that she got the builders'-risk policies. Those she admits taking are identified with the general insurance. She said she got them after the Chicago fire, which was in October, 1871, and she had no possible motive to get them till she became interested in the property in January, 1872, by getting notes secured on said property.

She seems to have been misinformed as to the solvency of two companies, and Holden, it seems, had those two policies transferred as he told her he had.

XII.

The Fifth Charge

is the subject of the second supplemental bill, so-called.

Rec., p. 31.

One of the three notes sold to Benedict came due; being unpaid, the holder called upon Messrs. McPherson and Wilson, the trustees, to sell the property. The trustees employed an auctioneer and advertised the property; when Mrs. Cox undertook to purchase the note from Mr. Kendall, the holder, in order to prevent the sale, and Mr. Kendall countermanded his order to the trustees, of course he became liable for the expenses incurred which

included half commissions to the trustees under the following express provisions of the deed of trust.

"And it is further agreed that if the property shall be advertised for sale under the provisions of the deed, and not sold, then the said trustee shall be entitled to one-half the commission above provided, to be computed on the amount of the debt hereby secured."

Rec., p. 23.

And when the trustees withdrew the property from sale they informed him they would exact the half commissions.

Mrs. Cox says she paid Kendall all the expenses and complains that this charge was exorbitant, iciquitous and shameful.

Rec., p. 31.

and asks the court to decree that Mr. McPherson (who had not yet received it from Mr. Kendall) be decreed to refund it to her.

No further notice of this seems necessary.

XIII.

Sixth Charge.

The next charge is that Mr McPherson for himself and Mr. Carlisle made unjust, unrighteous, and exorbitant demands against her after professing to be her friends.

Bill., par. 15 and 21; Rec., p. 3.

To this M. McPherson answered that the only fees ever demanded by him were $5,000 as agreed upon for recovering the square 312, and $125 for bringing suit for and recoveriug back rents, which he had deducted from the amount recovered.

Rec. p. 15.

As to the $125, Mrs. Cox testifies as follows: "In Angus and Lewis' first equity bill, they stated that they owed, I

think it was, $1,850. After the suit was ended, they brought in and gave to Marshal Phillips $1,252.05."

Rec., p. 59.

So far from this sum being voluntarily paid by Angus and Lewis without suit, an action was brought to recover it before the other suit was entered; it was defended under special pleas, except as to $494.05, admitted to be due.

Rec., p. 81.

This case went to trial, judgment and execution, and was collected by *fieri facias*. (Rec., p. 82.) Mrs. Cox says she remembers nothing of this (Rec., p. 61.) And yet she made the affidavit to the justice of the claim, as required by the rules of the court to compel the defendants to make their defence under oath.

Rec., p. 81.

On cross-examination she was asked:

"Int. You speak in your direct examination of Mr. McPherson's deducting $125, for fees and commissions, when he collected the $1,250; did he not institute an action at law to recover this $1,250?

"A. I don't know whether he did or not; they acknowledged it to be due in their equity bill, and said they would bring it into court when required to do so."

Rec., p. 61.

* * * * * *

"Int. Don't you know that you made an affidavit to be filed in a suit to recover the rent due before the perfection of the lease, and that the same was filed?

"A. I do not, I have no recollection of the kind."

Rec., p. 61.

The declaration, affidavit of Mrs. Cox, pleas, writs and marshal's return are copied in the record, p. 81.

XIII.

As to the agreement for the fee for recovering the square the testimony is as follows:

"*Deposition of James M. Carlisle.*

Rec., p. 50.

"Whereupon James M. Carlisle, a resident of Washington, D. C., a witness of lawful age, produced, sworn, and examined on the part and behalf of the defendant, deposes and says as follows:

"I am a lawyer by profession, and know the parties to this suit; I have known the complainant for upwards of forty years; the defendant, Mr. McPherson, is my partner at law. [The professional services of Mr. McPherson and myself were engaged by the complainants to recover possession of square No. 312, city of Washington, D. C.]

("Within brackets objected to by complainant.)

"Q. State in detail, as well as you remember, the circumstances of such engagement, and please also state whether or not at the time of such engagement any offer of compensation was made by complainant, and if any such offer was made, what was it; was the same accepted, and how and when was the same to be paid?

("Objected to by complaint's counsel as irrelevant, in this, that the defendant's answer has not been made a cross-bill, and there is no issue in the cause upon the point to which the question is directed.)

"A. Some years ago the complainant called upon me and consulted me professionally as to her rights, obligations, and remedies concerning that property, and exhibited to me the contract of lease and privilege of purchase, which she had executed and delivered to Messrs. Angus and Lewis; that paper was, I think, in the handwriting of Mr. Joseph H. Bradley, sr. On my first consideration of it, it seemed to me by no means easy to advise her satisfactorily and confidently. I think I requested that she

should call on a subsequent day in order that I might consider it more attentively in the meantime, which I did to the best of my ability, being sincerely desirous to give her safe and judicious advice. When she came again I communicated to her the conclusions which I had reached, and talked with her freely and fully upon the subject, rather as a friend than merely as counsel. I soon observed that she was counting upon my personal attention and activity in the contemplated litigation. I reminded her that I had restricted my practice to the Supreme Court of the United States and the Court of Claims, and that my blindness and increasing years made the practice in the nisi prius courts almost impossible for me; that the litigation, whatever should be determined upon, would necessarily begin by a suit or suits in the appropriate local court of the District of Columbia, and that I did not propose to resume my practice there. She combatted the difficulties I had suggested, and impressed me with the idea that she had relied confidently upon my being willing to manage the whole matter for her, and to give it my personal attention. I do not think she was, at that time, acquainted with my partner, the defendant, or, if at all, very slightly. I spoke of my confidence in his ability, learning and fidelity, and said that he practiced in the courts of the District, and that I would, without hesitation, commit to him any cause of my own with entire confidence, as I had done those of my old clients who still resorted to me; and that if the matter should go ultimately to the Supreme Court of the United States, as I had then no doubt it would, however the proceedings below might terminate, I would argue the cause for her there. She persisted in assuring me that she relied upon me alone, and should be satisfied with nothing short of my assuming the responsibility of the whole matter. She enlarged upon the importance of the case to her, and spoke of the value of the property if it could be cleared of all right in Angus & Lewis to pur-

chase it at the price stipulated in the original agreement. She said that it would not be in her power to make suitable compensation, except in case of success, but in that event she was willing, and would be quite able to pay a large fee. Up to this time it had not entered my mind to make any stipulation with her about fees. I was quite ready to render her all the services in my power on the footing of friendship, and I thing I so expressed myself then. She said she wanted it attended to as a business matter, and distinctly proposed, without the slightest suggestion on my part, that we should pay ourselves out of the fruits of the litigation the sum of ($5,000) five thousand dollars, contingent upon our success in recovering the property. I told her if this should be satisfactory to Mr. McPherson we would undertake it and do our best. Either then, or before she called again, I am not certain which, I conferred with Mr. McPherson, and he expressed his willingness to accept her propsition. When we all three met in my study she repeated her proposition, and seemed entirely satisfied with our acceptance of it. The first intimation I ever had that Mrs. Cox understood our agreement otherwise that as I have above detailed, was by a letter from her received by me some time in March last, I think. The letter is without date, and I exhibit it here marked Exhibit J. M. C., No. 1. It is in her handwriting. Until the receipt of that letter I had never heard of the sum of $2,500 as the amount of our compensation as suggested or contemplated by anybody, and I now repeat that the compensation offered by her and aecepted by us was never at any time the sum of $2,500, or any other sums than the precise amount of $5,000, contingent as above stated by me; and I cannot conceive how Mrs. Cox could so confidently write the contrary. I could not accept the distinction which she chose to make between myself and my partner, and I never replied to that letter. Perhaps for this reason Mrs. Cox has never come near me since.

I showed this letter to Mr. McPherson as soon as I saw him, and he subsequently showed me the two letters from the complainant, which I now exhibit, the one addressed to him and the other to us jointly, marked respectively Exhibit J. M. C., No. 2, and Exhibit J. M. C., No. 3.

"Q. Did you and Mr. McPherson act in concert, and if you did, what was the result of the service rendered by you or either of you?

"(Objected to as irrelevant.)

"A. We did act jointly, and I believe that I was personally consulted in regard to the slightest detail of the litigation, however unimportant. I refer to the records of the Supreme Court of the District of Columbia, to show the proceedings, both at law and in equity, with more precision than could be done by any statement of mine. Mrs. Cox was almost daily at our office, either in Mr. McPherson's room or mine, and passing from one to another. I rather think, however, that she occupied his time more than mine. The litigation resulted successfully for Mrs. Cox, and she recovered the square."

Rec., p. 50.

"*Deposition of Mrs. Mary A. Cox.*

Rec., p. 55.

"Whereupon Mrs. Mary A. Cox, a witness of lawful age, a resident of Washington, produced, sworn and examined for and by the complainant, deposes and says as follows, to wit:

"Int. Are you the Mary A. Cox who is the party complainant in the suit of Mary A. Cox against John D. McPherson, now pending in the Supreme Court of this District in Equity?

"J. M. Carlisle, a witness of lawful age, a resident of Washington city, produced, sworn and examined by and for the defendant, deposes and says as follows, to wit:

"Int. Have you heard read by the examiner the account of an interview between you and Mrs. Cox, given by her on pages 3 and 4 in her deposition taken before Examiner Anderson in this case; if so, state whether that account is correct, or whether it brings to your mind any particular not mentioned in your deposition in this case?

"A. The examiner has just read to me that testimony, and I have listened attentively to the same. The account therein given of the supposed interview with Mrs. Cox, is not correct, nor does it bring to my memory any particulars not mentioned in my deposition already given in this case. I have revolved the whole subject in my mind with all possible care and anxiety, and deliberately and now solemnly reaffirm my said former deposition in this case."

Rec., p. 74.

"*Deposition of John D. McPherson.*

Rec., p. 74.

"John D. McPherson, a witness of lawful age, a resident of Washington city, produced, sworn and examined by and for the defendant, deposes and says as follows, to wit:

"I am the defendant in this case. In the year 1867, about the beginning of September, Mrs. Mary A. Cox came to the office and desired to see Mr. Carlisle, and remarked to me that it was upon business which I would hear of, or words to that effect. She had to wait a short time before seeing Mr. Carlisle, and then went into his office. I left her there and did not again see her or Mr. Carlisle that day. I did not go into his office, and knew at that time nothing of the subject of their interview. On

the following morning Mr. Carlisle and myself had in his office a long consultation about some matter of difficulty and consequence. What it was I do not remember.

"When it was over, finding he did not mention the subject of Mrs. Cox's visit, respecting which my curiosity had been a little excited, I asked him what was the business which she had with him; he replied by telling me in very brief terms, that she had contracted to sell some property which had greatly increased in value and wished to recover it, supposing that the contract had been violated by the vendees, and desired to employ us for a contingent fee of $5,000; and he would consult with me and read the papers on some other occasion. Seeing that he was much pre-occupied with other matters, I merely said that whatever he thought proper to do I would join him in doing. Soon after this, perhaps the next morning, Mrs. Cox came to my office and into the back room where I sat. She asked me if Mr. Carlisle had spoken to me about her business; I told her that he had merely mentioned it to me; she then sat down at my desk and told me the particulars of her contract with Angus and Lewis, and the proposition she had made to Mr. Carlisle, naming the fee which she had offered him, $5,000, and that he would undertake the case if I was willing. After a while she went into Mr. Carlisle's office, and I went with her or followed her in a few moments. We there talked the matter over fully, and I think read the lease which she had previously left with him. In the course of the conversation, we accepted the engagement upon the terms she had offered, which were then restated. The amount of the fee was subsequently mentioned by Mrs. Cox, to me in this way—she was exceedingly anxious that Mr. Carlisle should try her case in the Supreme Court of the District, and wished me to endeavor to persuade him to do so, and spoke of the amount of the fee ($5,000) as a matter which

"A. I am.

"Int. Please state in detail the facts and causes that induced you to file your original (first) bill against Mr. McPherson."

* * * * * * * *

"In the year 1864 I sold this property (square 312) to Messrs. Angus and Lewis for $15,000 They violated their contract; I brought suit. When I determined to bring suit, I went over to Mr. Carlisle's office and told him what my intentions were. I said I had offered $2,500 to Mr. John S. Callan, provided Mr. Ward, a friend of his, thought the contract could be broken. Mr. Callan told me that Mr. Ward said he thought the contract could be broken. I then said to him (Mr. Callan) "I will let you know to-morrow." When I left Mr. Callan, I thought I would go down and see Mr. Carlisle. I told him what passed between Mr. Callan and myself, and what Mr. Ward had said. Mr. Carlisle said: 'Oh, he (Mr. Ward) is nothing but a scrivener.' I felt a little uncomfortable at the remark, and, raising my hand, said: 'Mr. Carlisle, I will give any one $2,500 who will break that lease.' He said: 'Well, I will speak to Johnny.' Mr. McPherson came into the office while we were talking. Mr. Carlisle said to him: 'Mrs. Cox is going to bring suit, and has offered $2,500.' Mr. McPherson said: "Well." They accepted with the utmost readiness, and I said I would bring over the lease. I did so, and the suit was commenced. Some months after the case was decided, I resold to Holden, Ford and King.'"

Rec., p. 55.

Cross-examined:

"Int. Please state when you went to Mr. John F. Callan's?

"A. Two or three days before I went to Mr. Carlisle's.

"Int. Where was Mr. Callan's office?

"A. On Louisiana avenue, between 6th and 7th streets.

"Int. Is he living or dead?

"A. He is dead.

"Int. Did you go to any other person before going to Mr. Callan?

"A. I did not.

"Int. Was Mr. Callan a lawyer?

"A. I don't know what his occupation was. I know he was a business man.

"Int. Don't you know that he was not a lawyer?

"A. I don't know whether he was or was not; I don't think he professed to be one.

"Int. Did you ever hear of his being a lawyer?

"A. Not that I remember. He was not to take the case himself; he was to employ a lawyer.

"Int. To what Mr. Ward do you refer?

"A. To a Mr. Ward who lives on Four-and-a half street. I think he is an examiner of titles. I don't know his name.

"Int. When did you go to Mr. Carlisle's office for the first time, respecting the suit of which you have spoken in your direct examination?

"A. After Mr. Callan told me that he had an interview with Mr. Ward, and Mr. Ward thought that the lease could be broken, Mr. Callan told me this, and then asked me, 'Now will you give it to me?' I said 'Wait until to-morrow.' When got up to Mr. Fendall's corner, I thought I would run down and tell Mr. Carlisle what I thought of doing.

"Int. Did you then see Mr. Carlisle?

"A. I did."

Rec., p. 60.

"*Deposition of James M. Carlisle.*

"Met pursuant to adjournment.

"Present: counsel for both parties.

ought to induce us to use every endeavor to earn it, and as a good compensation for such labor. The amount of the fee was again spoken of between Mrs. Cox and myself on the occasion of my bringing suit for the mesne profits, No. 8713, at law. I had an idea that counsel fees could be recovered I contemplated putting the amount in as special damages. I spoke to her about that, and we again had occasion to name the amount, and thought of putting in an item of $6,000 for counsel fees and expenses. Whether it was put in I do not remember. I called this morning to see the papers, but they were not on file, and I did not pursue the search."

There is here a conflict, *depending* on memory or veracity.

We submit that the account given by Mrs. Cox is improbable on its face. According to her account, Mr. McPherson knew nothing whatever of the case; had never heard of her property or her transactions respecting it; when he enters Mr. Carlisle's room he is greeted by Mr. Carlisle with the words, "Mrs. Cox is going to bring suit, and has offered $2,500." These words must have been utterly unintelligible to him; and yet he asks not a question, but accepts "with the utmost readiness" Is it not perfectly manifest that there had been prior communications between the parties; and if so, what were those communications?

Respectfully submitted

P. PHILLIPS,
W. A. MAURY,
G. F. APPLEBY.
For Appellant.

IN THE

Supreme Court of the United States.

AT THE TERM OF 1877-8.

No. 199.

JOHN D. McPHERSON, Appellant,

vs.

MARY A. COX.

Brief and Argument for the Appellee.

Advocati merces immoderata esse non potest, et concussionem fore impossibile est, si ante negotium initum contractus intervenit, quanta libet merces sit.—REI DEFENSOR.

Nihil exprimere ab egentibus, nihil ullâ vi à miseris extorquere.—CICERO.

ALBERT PIKE,
ROBERT W. JOHNSON,
L. H. PIKE.

WASHINGTON:
JOSEPH L. PEARSON, PRINTER,
Corner of 9th and D streets.
1878.

IN THE

Supreme Court of the United States.

AT THE TERM OF 1877–8.

No. 199.

JOHN D. McPHERSON, APPELLANT,

vs.

MARY A. COX.

Brief of Appellee.

§ 1.

FACTS AND PLEADINGS.

1st. Mary A. Cox, a widow, owned square 312, in the City of Washington, in which city she resided; and on the 26th of November, 1870, sold it to Charles H. Holden, Charles W. King, and Samuel Ford for $38,000, to be paid by the end of ten years from that day, with interest on it, payable yearly on the 26th of November, 1871, and each year afterwards, the purchasers having the right to pay the principal in sums of not less than $3,000 each whenever they might elect.

Original Bill, Record, p. 1.
Answer, Record, 12.

2d. On the day mentioned she conveyed to them, and they executed a bond to her for payment of the principal sum and the yearly interest, and they also, on the same day, conveyed the same premises to John D. McPherson (a lawyer of the Washington Bar, partner of Mr. James

M. Carlisle) and to Jesse B. Wilson, (she having selected Mr. McPherson, and they Wilson,) in trust to secure payment of the purchase-money and yearly interest, the vendee to have possession, use, and profits until default, and on full payment, the trustees to release to them, but in default of payment of principal or any interest, the trustees to sell at auction, on such terms and notice as they might see fit, so much of the land as would pay the sum due, paying out of the proceeds costs, expenses, and commissions, then the moneys due Mrs. Cox, and the residue to the vendees.

Original Bill, Record, 12.
Exhibit A of Bill, Record, 5.
Answer, Record, 12.

3d. There was also a provision that on payment of any installment the trustees should release to the vendees any part of the land that they might indicate, two square feet for every $3.50 paid.

Original Bill, Record, 2.
Exhibit A, Record, 6.

4th. The bond of Holden, King, and Ford was received by Mr. McPherson upon its execution, and he still holds it.

Original Bill, Record, 3.
Answer, Record, 14.

5th. King sold or relinquished his interest in the premises, it appears, to Holden and Ford. Mrs. Cox, acting by the advice of Mr. McPherson, released several lots without any consideration in money; and three, (26, 27, 28,) which Holden and Ford sold to James T. Pike, on which occasion she received $2,000 of the principal of the bond and some $2,300 of interest, and the notes of Pike made to Holden and Ford, and by them endorsed to her, for $13,000, which she received in part payment of the bond of Holden, King, and Ford for $38,000. Since when, Pike has owed her $780 interest per annum, and Ford, to whom Holden afterwards sold or relinquished, $1,380 per annum.

These facts are not fully or with entire accuracy stated by the bill.

Original Bill, Record, 2.
Amendment of Bill, Record, 3.
Answer, Record, 14.
Testimony of Ford, Record, 33.

6th. On the 26th of November, 1872, Ford owed her, unpaid interest for the year then ending, $880, and he still owed this on the 11th of June, 1873.

Bill, Record, 3.

7th. On the 11th of June, 1873, Mrs. Cox filed her bill against Mr. McPherson alone, to have him removed as trustee and another person substituted, and to have the bond given up to her, and for general relief, in which she stated the facts above recited, and others as follows:

8th. That the interest payable on the purchase-money was her only means of support, and this Mr. McPherson, having been for years her counsel, and perfectly well acquainted with her circumstances, and, with his partner, having professed and seemed to be her friend, well knew.

Record, 3.

9th. That about three months before, without any right to do it, or possible pretence of right, he cruelly and maliciously, out of ill-will and dislike, "did thrice notify the said Ford to pay to complainant nothing more on account of said interest without consulting him," which notice Ford, being his client in other matters, readily obeyed, and had since then paid her nothing, and would fail to pay the coming year's interest.

Record, 3.

10th. That it was Mr. McPherson's duty to see the interest paid and in default to compel payment, instead whereof he prevented it, thus withholding the daily bread and the means of sustaining the life of her children.

Record, 3.

11th. That Ford had permitted a large amount of taxes and assessments to accumulate on parts of the land since August 1st, 1871; for non-payment of $630.07, part thereof, five of the lots have been sold, and the time for redemption will expire on the 14th of October, 1872; Mr. McPherson had made no effort to compel payment of the taxes and assessments, in that neglecting his duty as trustee.

Record, 3.

12th. That in the latter part of May, 1873, she, by letter, requested him to resign his trust, and notified him that if he did not she would apply to the Court for the appointment of a new trustee.

Record, 4.

13th. That friendly relations do not exist between her and him, "the chief cause thereof being what she regards as unjust, unrighteous, and exorbitant demands in bad faith made against her by him for the firm of Carlisle & McPherson, which she refuses to recognize."

Record, 4.

14th. That in consequence of the premises it was manifestly unfit that he should continue to be trustee, and if he did it would cause her great loss, wrong, and injury.

Record, 4.

15th. The sales by Holden and Ford to James T. Pike, of lots 26, 27, and 28, took place on the 1st, 2nd, and 3rd days of January; at least, Pike and wife conveyed those lots, on those days, to Messrs. McPherson and Wilson, each conveyance being made to secure the payment of the purchase-money of the lots conveyed, $5,333.33, evidenced by five notes, amounting together to that sum, payable respectively in two, three, four, five, and six years from their date. The whole purchase-money being $16,000, she received in money $2,000, and the twelve notes payable in three, four, five, and six years; the other three for $1,000 each, payable in *two* years, having been used to raise the money

on, which was paid to her, and being afterwards held by one Westervelt and his wife, and one John E. Kendall

Testimony of McPherson, Record, 77.
of Mrs. Cox, Record, 56.
of Samuel Ford, Record, 37.
of James T. Benedict, Record, 40.
of Charles H. Holden, Record, 45.
Exhibit A. of Suppl. Bill, Record, 21.

16th. The three deeds of trust were precisely alike. Each conveyed a lot to secure the five notes of Pike to Holden and Ford for $5,333.33 (four for $1,000 each, and one for $1,333.33), payable as stated above, with interest annually. The lots were conveyed in trust, the vendee, Pike, to occupy, use, and enjoy until default, the trustees to release to him on full payment, and on any default to sell at auction, after 10 days' notice, for payment of all unpaid indebtedness in cash, the residue on a credit of 6, 12, and 18 months, secured by notes and deed of trust.

Copy of Deed, Exh. A of Suppl. Bill, Record, 21.

17th. The deeds stipulated a commission on sales, of five per cent., and no liability to see to application of the purchase-money by the trustees. Pike covenanted with them that the taxes should be duly paid and the building on each lot be kept insured in the sum of $3,500 for the benefit of the debt, and the policies be assigned to the trustees. On failure to pay taxes or to insure, the holder of the notes to have the right to do it and to have the property sold as for expenses. If the lands should be advertised and not sold, the trustees to have half the commissions, *to be computed on the whole debt secured.*

Copy of Deed, Record, 23.

18th. On the 27th of June, 1873, Mrs. Cox filed an amendment to her bill, imperfectly stating part of these facts, alleging that she had learned since filing her bill that the three notes first falling due were so made and secured,

with the knowledge and consent of Mr. McPherson, and without her knowledge and consent.

Amend't to Bill, Record, 9.

19th. And she alleges that he demanded of her unjustly and wrongfully an exorbitant fee for certain services rendered, before he was trustee, by the law firm of which he is a member; and that as the holders of the three notes would demand a sale at maturity of the notes, and the holders of two of them had so notified her, he would have the power, if there was a sale, to retain the fee claimed by him, to her wrong and injury, "which interests and claim make him unfit to continue to be trustee, as his conduct as trustee, as herein and in the bill set forth, proves him always to have been unfit." And she renewed the prayer of the bill.

Amend't to Bill, Record, 8.

20th. Thus she asked a change of trustee for three reasons:

1st. That he had twice notified Ford to pay her no interest.

2d. That he had neglected to see that the interest, taxes, and assessments were paid.

3d. That Mr. Carlisle and himself claimed of her, for law-services before he was trustee, an exorbitant and unjust fee, and he would retain it out of the purchase-money if he should make sale as trustee.

21st. By his answer, printed before filing, he admitted the first of these, endeavoring to dilute and weaken the admission.

Answer to Original Bill, Record, 13, 16.

22d. The second he admitted, adding that no duty was imposed on him as trustee to see that interest should be paid to her, or that the taxes were paid and the property kept insured; although he claims to have (for himself and his partner) a lien on the bond for $5,000, and to be entitled to

that sum, part of the $38,000 secured by the deed to him and Wilson; which is a claim that, to that extent, he is trustee for himself and Mr. Carlisle.

Answer to Original Bill, Record, 13, 17.

23d. To proving the third he has with the utmost painstaking diligence devoted himself, from the beginning until now, with the most satisfactory results, more than justifying every statement on that point in the bill.

24th. On the 1st of October, 1864, Mrs. Cox had leased the same property for a term of ten years, with right to purchase at the end of that time by paying $15,000, provided the lessees should have performed all their covenants. It was a condition of the lease and of this right, that Angus and Lewis, the lessees, should put up buildings on the property within twenty-four months from the date of the lease, to the value of $5,000; and they were to pay the taxes.

Testimony of McPherson, Record, 13.

25th. This covenant to hold was not complied with; and in September, 1867, Mrs. Cox employed Carlisle & McPherson to regain possession of the property for her, on account of the forfeiture.

Answer of McPherson, Record, 13.
Testimony of McPherson, Record, 75.
Testimony of Mrs. Cox, Record, 55.

26th. Mr. McPherson testifies that the failure to erect the buildings was not, by the contract, a forfeiture of the lease; and there had as yet been no failure to pay the taxes. But they gave notice to Angus and Lewis, nevertheless, on the 12th of September, 1867, "that as they had failed to put up the improvements within the time specified, their right of purchase was gone."

Testimony of McPherson, Record, 76.

27th. Some time after, Angus and Lewis neglected to pay the taxes; and Carlisle & McPherson brought ejectment,

obtained judgment, and regained possession. Angus and Lewis filed a bill in equity to enjoin the suit, but were defeated in it. McPherson afterwards instituted an action to recover for use and occupation from July 1, 1867, to August 31, 1868. In this he collected $1,276.82, and deducted out of it a commission of ten per cent. for collecting; *that* service not being included in the contract for the recovery of the property, in the opinion of Mr. McPherson.

Testimony of McPherson, and Exhibit J. M., Record, 76–80.

Testimony of Mrs. Cox, Record, 59.

28th When he engaged in the case, he testifies, he considered it *extremely doubtful*, because, "although the contract was in form a lease with the privilege of purchase at the expiration thereof, *provided the lessees should have performed all their covenants*, yet, in truth, it was a contract of sale; and if the lessees *had thought proper to hold on to the property* until the termination of the lease, and then filed a bill for specific performance," he thought, and still thinks, "they could have compelled the conveyance."

Record, 76.

29th. Mr. McPherson's testimony as to the contents of this deed and as to the record of the ejectment and chancery suits was objected to as incompetent, and, of course, was so. Nor did he produce in evidence the deed itself or a copy of it or of the record, to enable the Court to judge of the correctness of his notions in regard to the lease and its provisions, or to know with certainty the nature of the services rendered, or their value.

Record, 79.

30th. On the 23d of November, 1872, Mr. McPherson, by a note to Mrs. Cox, informed her that there was a matter which gave Mr. Carlisle and himself some anxiety. "We have nothing in writing from you," he wrote, "showing the terms of our agreement respecting the square recovered from Angus and Lewis, *out of which we were to*

have five thousand dollars." And as she might die, and things would be unpleasant, he desired her to sign an acknowledgment, which he enclosed, to the effect that she owed them $5,000 for their services in the suits for the recovery of square No. 312, "the same being the contingent fee, which on their bringing the suit, I promised to pay them out of the proceeds of the property in controversy, when sold, if the same should be recovered from the lessees, and which is a lien upon the securities received for the proceeds."

Copy, Record, 86.

31st. The next day she replied, "*I never made such a promise.* My offer to Mr. Carlisle, to whom I first named the subject, was *distinctly* $2,500, contingent fee for the recovery of 312 . . . I offered neither one dollar more nor less, and that I will honestly pay, but not one dollar more." She wrote to the same effect to Mr. Carlisle. On the 20th of March, 1873, Mr. McPherson begged her early attention "to the payment of the fees in your cases against Lewis and Angus." He spoke of what she had written to Carlisle, and of what she had stated to him, and said: "You are of course aware how excessively disagreeable it would be to Mr. Carlisle to have any controversy with you, either *as a witness* or otherwise, *and this fact is worth something to you in money*, though not the amount you demand. If you are prepared to offer payment I will entertain the proposition for an abatement, *the more prompt the offer, the more chance for abatement*; but I assure you that it is simply Mr. C's reluctance to appear against you that prevents me from having our controversy determined by the proper tribunal."

Copies, Record, 86, 88.

32d. The same day Mrs. Cox replied, sharply enough, to this rude letter, and afterwards demanded the bond of Holden, King, and Ford.

Copy of Letter, Record, 88.

33d. Both Mr. Carlisle and Mr. McPherson testified in support of their demand for $5,000, and both have positively sworn that Mrs. Cox voluntarily offered and agreed to pay $5,000 to have the contract with Angus and Lewis broken. She, testifying *as* positively and unequivocally, asserts that she offered only $2,500. As each claims to recollect distinctly, and swears in the most positive manner, either they or she are grievously mistaken.

Record, 51, 74, 75, 55, 66.

34th. Mr. Carlisle was vehemently urged by her to give his *personal* attention to the suit proposed to be brought in the Courts of the District. She combatted the difficulties he suggested, (when he told her he could not practice in those courts). "She persisted," he testifies, "in assuring me that she relied on me alone, and should be satisfied with nothing short of my assuming the responsibility of the whole matter." She spoke of the value of the property and her willingness to pay a large fee, and then he began to think of an agreement for a fee. She offered $5,000, he testifies, contingent on success. "I told her if this should be satisfactory to Mr. McPherson, we would undertake it and do our best." *He does not state that he ever appeared in the case, in court.* "*We did act jointly*," he says, "and I believe that I was personally *consulted* in regard to the slightest detail of the litigation, however unimportant," and he refers to the record, which, however, *did not make its appearance.*

Testimony of Carlisle, Record, 51.

35th. Mr. Walter S. Cox was employed to assist Mr. McPherson in the equity case. He states that Mr. Carlisle appeared neither in that nor in the suit for rents, which was not tried. In fact, he says, Mr. Carlisle "did not practice in that court, nor never has."

Record, 70.

36th. Mr. McPherson testifies that Mr. Walter S. Cox was employed by Mrs. Cox. Mr. Cox testifies that Mr.

McPherson met him, and said that he wished him to join him in the case, and his impression is that he added, either that Mrs. Cox desired it, or had authorized it. Long after the case was decided, *and he had forgotten all about it*, Mr. McPherson told him that there was $1,000 coming to him from the case of Cox and Angus and Lewis. Afterwards he understood him to say that Mrs. Cox said that she expected to pay him $1,000. But when, in September, 1873, he wrote *her* a note about it, she claimed that Carlisle & McPherson were to pay his compensation out of their own fees.

Testimony of Walter S. Cox, Record, 69.
of McPherson, 84.

37th. But Mr. McPherson testifies that *she* expressed a desire to have additional counsel, and he, at her desire, employed Mr. Cox, and afterwards mentioned $1,000 as the amount of his fee. And he endeavors to strengthen his statement, as he does in regard to the fee agreed with himself and Mr. Carlisle being $5,000, by saying that he talked about including both fees in the damages demanded *in the suit for mesne profits*, and says "the papers in that case I cannot find; they have been taken from the files of the Court, but, to the best of my recollection, *the fee due Cox was included in the damage*, in addition to the fee of $5,000 due Carlisle & McPherson." *But he has not given the Court an opportunity to inspect that record.*

Testimony of McPherson, Record, 84, 85.

38th. Thus, according to the answer and testimony of Mr. McPherson and the testimony of Mr. Carlisle, they readily accepted an offer from Mrs. Cox to pay them a fee of FIVE THOUSAND DOLLARS for obtaining rescission of a lease of land, when a distinct and positive covenant in it might be broken; the mode to be adopted being an ordinary action of ejectment; and the defendants resorting to an unsuccessful bill in equity, *the grounds of which Mr. McPherson does not state, nor with how much or how little trouble it was*

disposed of. And, because Mr. Carlisle *would not* in person attend to the equity suit, they also expect her to pay Mr. Cox a thousand dollars more, for taking his place. And, in addition, Messrs. Carlisle and McPherson received 10 per cent. on the mesne profits collected ($127 68), and claim 10 per cent. on $1,500 damages collected by her; making the whole amount, paid and claimed, SIX THOUSAND TWO HUNDRED AND SEVENTY-SEVEN DOLLARS.

39th. Mrs. Cox, Mr. McPherson says in his answer, "was left a widow many years ago, and intrusted by her husband's will with full power over a property which, though not large, would have afforded the means of gayety and enjoyment for a season. Yet, resisting every such temptation, she devoted herself to the management and preservation of her property, which she foresaw would one day attain a value that would afford a competence for her children. In this she exhibited a wonderful self-denial and steadfastness of purpose, and as a widow bent on discharging a trust, committed to her by her husband, as a mother striving to provide for her children, and as a woman struggling with the hard business of the world," he felt for her sympathy and regard, and if he did not *profess*, he *felt a very warm interest* in her business.

Answer to Original Bill, Record, 15.

40th. Mr. Carlisle testifies that when she applied to him (in the fall of 1868) to bring the suit against Angus and Lewis, he does not think she was acquainted with Mr. McPherson, or, if at all, very slightly.

Testimony of Carlisle, Record, 51.

41st. The first connection, therefore, which Mr. McPherson had with her business was upon that occasion. He states that while her suit was in progress he lent her upwards of $1,800, on $1,100 of which he charged no interest, and that Mr. Carlisle also lent her *considerable sums not yet repaid.* And as the fruits of their friendship for her, he

counts $23,000 *profit* on square 312, (of which he seeks to appropriate $5,000 for himself and partner and $1,000 for Mrs. Cox,) and $2,700 back rents and mesne profits.

Answer to Original Bill, Record, 15.

42d. It is quite evident that she felt the warmest friendship for Mr. Carlisle, and reposed unlimited confidence in him, if not in his partner. Mr. McPherson says, in his answer to the original bill, "She made her own bargains and was competent to do so. . . . Everything I did was simply to carry into effect bargains made by herself, . . . as trustee, I have, with Mr. Wilson, executed releases at her request." But Mr. Holden, testifying, states that when he called on her to see on what terms the release of the lots to be sold to Pike would be made, she, rather coolly, as he thought, told him she had an attorney, and referred him to Mr. McPherson; and Mr. Benedict states that she had nothing to say when the arrangements were being consummated. Mr. McPherson himself tells us in his answer to the original bill, how much of the time of his partner and himself she occupied, *consulting him on every imaginable subject connected with her business*, and her hopes, fears, plans, expectations, and troubles, and that whatever the subject, he gave her the results of his best judgment.

Testimony of Holden, Record, 46.
Benedict, Record, 41.
Ans. to Original Bill, Record, 14, 15.

43d. She received his sympathy and regard, Mr. McPherson says, until "the exhibition made of her *faithlessness*, her *untruthfulness*, and her *ingratitude* for our kindness." She did not exhibit these traits of character, it appears, until the 24th of November, 1872, when still addressing him as "Dear Mr. McPherson," as he had, the day before, addressed her as "Dear Mrs. Cox," she denied having promised to pay a fee of $5,000. When he made known his intention of suing her, she said to Mr. Carlisle, "If you

sanction this threat you are not the James M. Carlisle I have loved so dearly and trusted so implicitly."

Ans. to Original Bill, Record, 15.

Copies of letters: A, 1; A, 4; J. M. C., 1; Record, 86, 87, 88, 89.

44th. She was grateful for Mr. McPherson's kindness in loaning her money, as her note to him, after she had repaid him $1,000 of it, shows. Besides informing the Court of his favors in this way done to her, Mr. McPherson also adverts gracefully to the fact that Mr. Carlisle had loaned her "*considerable sums, not yet repaid.*" That gentleman, on the 31st of January, 1871, said that he had no doubt she had kept (which he had *not*) a faithful account of "some little advances" which he had made to her for taxes, &c.; asked her to look at it, and if it should suit her wishes, to send him two dozen of wine (worth, she testified, $15 a bottle) "such as you sold to Evarts and *gave* to me, at your own price." She testifies that he loaned her $70 and $300, and she sent him 14 bottles of wine, besides presenting him with 11.

Note: A, 11, Record, 89.

Testimony of Mrs. Cox, Record, 59, 60.

45th. As to the first ground assigned by the original bill, of the prayer for a change of trustee, Mrs. Cox, on the 20th of March, 1873, in a letter to Carlisle and McPherson, said, "I must protest against Mr. McPherson advising my debtors *not* to pay me my honest dues until *he* has been consulted."

Letter, A, 8, Record, 89.

46th. In his answer to the original bill, Mr. McPherson said. "The 16th paragraph of the bill charges that I cruelly, maliciously, and without right have prevented the said Ford from paying to her the interest on the bond. The allegation *is, in every essential particular, untrue.*"

The allegation was that he had twice notified Ford to pay her nothing more on account of such interest, without consulting him, and that Ford had readily obeyed him;

whereby Mr. McPherson had caused her great distress, need, embarrassment, and humiliation, and was unfit longer to be her trustee.

Answer, Record, 13.
Original Bill, Record, 3.

47th. He proceeds to say, that after she had resold the land for $38,000, and received in cash and notes $15,000 [in cash, $2,000, of which she paid him $1,000; and notes $15,000, *none due until three years* after the 3d of January, 1872], and $1,250 back rents [less fee of 10 per cent.]; and when she had denied agreeing to pay a fee of $5,000, saying she agreed to pay only $2,500; "I thereupon gave notice to Mr. Ford *that we had* A LIEN *upon the land*, and had possession of it AS SECURITY *for our fee*, and that he *must make no further payment to her on account of it until our* LIEN *was satisfied*." But, before the filing of the bill, he adds, learning from her, that Ford considered this notice a reason for not paying the interest, "I told him we did not desire to stop the payment of the interest, but only of the principal to the amount of our fee AND INTEREST THEREON."

Asked, when testifying, whether he had not, on more occasions than one, notified Ford not to pay Mrs. Cox the interest on the bond, he said, "I notified him on one occasion, and on another occasion reminded him that I had given him such a notice. . . . The notice was not confined to the interest, *but was simply a notice to pay* NOTHING *to Mrs. Cox*. And when he countermanded the notice, his object, he said, "was simply to release him from the prohibition of my notice."

Answer to Original Bill, Record, 13.
Testimony of McPherson, Record, 80.

48th. Ford is not certain when the prohibition was removed. He says that after the prohibition, and before its removal, he, on the 27th of March, 1873, paid her a check; and therefore thinks he removed the prohibition at an earlier date than June. The bill was filed on the 11th of

June. Whenever the prohibition was removed, Mr. McPherson does not say that he informed Mrs. Cox of its removal; and it is certain that after its removal Ford paid her nothing.

Testimony of Ford, Record, 36-38.

49th. Mr. McPherson says in his answer that it was not his duty to see that the interest was paid; that the duty of compelling payment of taxes is not imposed on him by the deeds of trust, or in any other way; and, in effect, that his only duty is to sell on default when she may require him to do so; and he thinks it is perfectly fit that he should continue to be trustee. His interests as lawyer and creditor, he thinks, are in no degree inconsistent with the faithful performance of his duty as trustee. She owed him and his partner when the deed was made, and being no disqualification then, it is no more such now.

Answer to Original Bill, Record, 13, 14, 17, 18.

50th. The answer to the original bill and amendment was not made a cross-bill, nor was the complainant called on by interrogatories or otherwise, to answer any of the affirmative allegations contained in it.

51st. Westervelt and wife, holding two of the notes, payable at the end of two years, given by Pike, for $1,000 each, having, before the 3d of March, 1874, notified Mr. McPherson to sell the two lots, by deeds of trust whereof their notes were secured, the complainant filed a supplemental bill, setting forth more fully and correctly than she had done in the bill, the circumstances of the sale of lots 26, 27, and 28 by Holden and Ford to Pike, and the execution of the notes and deeds of trust, stating that the three deeds of trust were in the hands of Mr. McPherson, and that the other note, due in two years, was then held by John E. Kendall.

52d. She alleged that Mr. McPherson claimed, by his answer to the original bill, to have a lien on the bond of

Holden, Ford, and King for $38,000, to secure a pretended fee of $5,000, to prove which he had taken his partner's testimony; that Mr. Carlisle was no party to the suit, and there was no issue in it, in regard to their claim and pretended fee, nor had Mr. McPherson sued or impleaded her for it, or given her opportunity to answer in regard to it, or asked decree that the lien existed, or any relief in regard to it.

53d. But she reiterated her allegation that he and his partner "do claim of her an exorbitant fee, as his answer shows to be true;" that she never offered or promised or expected to pay any such fee, or any more than $2,500; that the fee claimed is *not exorbitant*, but INIQUITOUS and a shameful charge against her; that what she offered was five times too large a compensation for the services rendered, and she will pray protection against even *that* charge.

Suppl. Bill, Record, 18 to 21.

54th. She alleged that if he made a sale, he would retain the amount of the fee claimed, without giving her, by suit or proceeding, an opportunity to deny and resist his demand, and to put him and his partner to proof thereof.

Record, 19.

55th. Also, that he had in possession the bond for $38,000, and claimed for himself and partner a *lien* on it for the fee of $5,000 claimed, which she does not owe, for which they had no action in that Court, nor any lien that they could enforce there.

Record, 20.

56th. The deeds contained covenants by Pike with the trustees, McPherson and Wilson, that all taxes on the lots should be duly paid and the building on each *kept* insured in the sum of $3,500 for the benefit of the debt secured by the deed; and the policy or policies of insurance be assigned to the trustees.

Copy of Deed, Record, 23.

57th. If sale were made, on any default, the purchaser to pay "the amount of indebtedness secured by this deed of trust unpaid, with expense of sale," (and taxes or insurance-premiums paid by holders of the notes,) in cash; and for the residue, to give notes at 6, 12, and 18 months, secured by deed of trust; and the commissions of the trustees to be five per cent.; and in case of *advertisement*, and no sale, *Mr. Pike* agreed that the trustees should have half commissions, or two and a half per cent. His *right* to provide for these commissions is taken for granted.

Copy of Deed, Record, 23.

58th. She stated that by each deed, Pike had covenanted *with the trustees*, to pay the taxes on the lots and to keep the buildings on them insured, and that the taxes had not been paid; and since filing her bill, she had found that there was no insurance on either of the buildings; and that as Mr. McPherson said it was not *his* business to see that they should be insured, and Pike told her that he had put $150 in McPherson's hands wherewith to insure them, *she* had been compelled, during six months, herself to keep them insured.

59th. She reiterated the prayer of the original bill, and asked that McPherson be decreed to bring into Court and surrender to her the $38,000 bond; and be prohibited by injunction, if he and his co-trustee should sell, to receive any moneys or notes that would in whole or in part satisfy any of the notes of Pike that were held by her (being all but the three first due), and that the purchaser pay the same into Court.

Suppl. Bill, Record, 20–21.

60th. The answer admits the notice to sell, alleges that she knew from the beginning all about the three notes held by Westervelt and Kendall, argued that these being the first due could not harm her, reasserted that she *did* offer a fee of $5,000; argued upon the subject of her demand for the bond, without tendering the $2,500 which she admitted

owing; denied intention, in case of a sale, to appropriate the proceeds to the satisfaction of the fee demanded, argued that he could not, if he wished; and offered to pay the proceeds into Court; claimed a lien on the bond, in favor of Carlisle & McPherson, and denied that he was under any obligation to see that the taxes were paid or the buildings kept insured.

Ans. to Suppl. Bill, Record, 26.

61st. As to the mere nonsense and babble contained in this answer, it need hardly be noticed. For example, that the Court ought not to permit Mrs. Cox, by swearing to her supplemental bill, without having made herself a witness, to controvert the testimony of Mr. Carlisle. She controverted the statements in Mr. McPherson's *answer*, and, *therefore*, the testimony of his partner; and this, because there is no other way to do that, in equity.

62d. The deeds of trust made by Pike, he says, impose on the trustees no such duty as that of paying taxes. It is not pretended by the supplemental bill which he was answering, that there *was* any such duty. It was claimed, on the contrary, only that it was their duty to see that the covenant to pay the taxes, *made with them*, should be kept by the debtor, with whom Mr. McPherson had bargained for five per cent. commissions on the whole debt, for selling, and two and a half per cent. for advertising. He and his co-trustees, he said, "have a dry legal estate in the premises."

Ans. to Suppl. Bill, Record, 27.

63d. Nevertheless, he says in the same answer: "This defendant and the said Carlisle *claim a lien* on the said bond; . . he holds the said bond *not as trustee*, but as attorney and solicitor, to protect the lien for the fee of $5,000 due to himself and partner." And he also asserts that Mrs. Cox knew and stated to him that he *had a right to the papers*, and recognized that right, when she left the bond with him; and he swears that "she gave the same to

him, *owing to the claim of this right to the same, to protect the fee due to himself and the said Carlisle, for the sum of* $5,000."

Record, 26.

64th. On the 23d of May, 1874, she filed a second supplemental bill, showing that Kendall had demanded a sale of the lot, the deed of trust whereon secured the note of Pike for $1,000, which he held; that McPherson and Wilson advertised the lot for sale, and she had to pay the note and become owner of it, to prevent a sale and sacrifice, raising money for that purpose at a large rate of interest. She shows that she was compelled to pay Kendall as follows:

Amount of note, interest, and cost of protest.....	$1,084 40
Cost of advertising and auctioneers.....	43 25
Half commissions, $5,805, "*claimed by trustees.*"..	145 00
	$1,272 65

So Mr. Kendall furnished account, and so he was paid, under protest.

2d Suppl. Bill, Record, 30–31.

Exhibit of 2d Suppl. Bill, Record, 31–32.

65th. Upon which she submits that the trustees could not lawfully exact any commissions at all, and still less on the notes which she held (for $4,333 in the whole), on which she asked for no sale, and bought the one that Kendall held to prevent a sale; and whether one who would make such a charge and practice such extortion, in such a case and under the circumstances, is fit to continue to be trustee.

2d Suppl. Bill, Record, 31.

66th. In this answer, Mr. McPherson says: "It is wholly untrue that the plaintiff was compelled to pay this defendant and Wilson the sum of $145 for half-commissions." In Kendall's account, exhibited with his supplemental bill, it is stated that the half-commissions were "claimed by the trustees." That sum was paid by Mrs. Cox and received by Kendall for them.

Ans. to 2d Suppl. Bill, Record, 32.

67th. Mr. McPherson continues his denial by saying, that the averment that the money had been "demanded by him and paid to him," is *utterly* and *wholly* false and untrue; that he has never received *any money* on account of such half-commissions from her or Kendall. But he proceeds to admit that when Kendall ordered the advertisement, he *told* him he *would be liable* for half-commissions; *and he agreed to do so.* And that when he inquired the expenses, he was told that the trustees would be entitled to their half-commissions, and these were computed at $145. The advertisement was withdrawn on the condition of his being responsible for these half-commissions, and he afterwards offered to pay the amount if McPherson and Wilson would sign an agreement to hold him harmless, which he, McPherson, refused to do, informing him that he was entitled to his commissions and looked to him alone for them.

Record, 33.

68th. In his answer to the original bill, Mr. McPherson says: "I thereupon gave notice to Mr. Ford *that we had a lien upon the bond*, and had possession of it as security for our fee, $5,000; and he must make *no further* payment to her on account of it, *until our lien was satisfied*. . . . I did give a general notice to Ford not to pay anything on the bond *until our lien was provided for.*"

Record, 13.

In his answer to the 1st supplemental bill he says: "The defendant and the said Carlisle claim a lien on the bond. . . . He holds the said bond, not as trustee, but as attorney and solicitor, to protect the lien for the fee of $5,000." And, he adds, that she knew and said that he had a right to the papers, and recognized that right when she left the bond with him; and that she gave it to him, owing to the claim of this right to the same to protect the fee due himself and Carlisle, for $5,000.

Ans. to 1st Suppl. Bill, Record, 26.

69th. Mrs. Cox, testifying, says: "Understandingly and knowingly I never saw this bond, or never laid my finger

upon it, and never had a word of conversation with Mr. McPherson or Mr. Carlisle on the subject of security, not even an allusion that they either desired or wished it; so that there is not a grain of truth in his (McPherson's) assertion that I ever gave him this bond, that I never saw, as security for a fee of $5,000, which I never offered; therefore I positively, unhesitatingly, and unreservedly deny this most untrue statement. The bond came into his possession when the property was sold; this I heard from other parties, but I *know* nothing about it."

And again: that when she sold to Holden, Ford, and King, she left everything to Mr. McPherson, has no recollection about a word being said to her about a bond; relied upon Mr. McPherson implicitly; took it for granted there would be a deed of trust; did not know whether there would be notes or what; heard the bond spoken of afterwards, but to the best of her recollection never saw it. He held the other papers and she took it for granted that he held the bond, as security to *her* for the payment for the ground.

Testimony of Mrs. Cox, Record, 59-67.

70th. Mr. McPherson, testifying, states that the bond was delivered when her deed was, and she was present and directed him to take it, and he did so. Once she asked him if he thought she would have taken any of the papers without his knowledge; and said that she would not think of taking any of the papers without his consent. "She added some words which I do not now remember distinctly, acknowledging that she had no right to take them. I think she said that she considered them ours." He cannot say whether this was before or after he had the bond, but he *felt satisfied*, in all his intercourse with her, that she recognized and admitted their interest in the proceeds, and in the papers which secured them; and when he took the bond he did it with the *belief*, "*that we had a right to hold it as security for our fees;* and we do hold and insist upon holding it still."

Record, 78.

But he does not wish to be understood as testifying that "she had any specific idea in her mind as to our having a lien upon it for our fee, *or that any idea of our fee occurred to her* in that connection." He means that she regarded *them* as the proper custodians of the paper until their business with her, as her counsel and attorneys, should be settled; and that if the question had then been raised, she would not have contested their right to hold it. This is the impression left on his mind; and if it does not agree with his answer to the supplemental bill, he desires to qualify that by it.

Record, 78.

71st. The decree of the Court was, (and we did not object to its reluctance to censure the defendant and his partner, nor to the palpable error of permitting him to retain the bond, nor to the equally palpable one of transferring the controversy as to an enormous fee claimed by its officers, to a Common Law Court and a jury, if he should choose that forum,) that "on account of the ill-feeling and unfriendly relations" between the parties "by reason of the unfriendly and angry disputes between them," especially in regard to the claim of fee and lien; and without consideration of any other allegations of the complainant, it was fit and proper that John D. McPherson should cease to be trustee; and, therefore, it divested him of title to the land and vested it wholly in his co-trustee; and decreed that the divested trustee should deliver the bond to the sole trustee, to be held until the further order of the Court.

And because the Court considered that it had not jurisdiction to inquire into and adjudge in regard to the fee claimed or as to the lien claimed, it declared that it would retain the cause without making final disposition of it, or any further order or direction, until Messrs. Carlisle and McPherson should there or elsewhere by proper suit have adjudication as to the indebtedness and the lien on or right to retain the bond.

Record, 91, 92.

Points of Law.

1st. When the original bill cannot properly be amended, any *new* matter necessary to be put in issue can be introduced by supplemental bill.

Story Eq. Pl., § 333.
Goodwin v. Goodwin, 3 Atk., 370.
Dodge v. Dodge, 29 N. Hamp., 177.
Veazie v. Williams, 3 Story, 54.

2d. And if the object be to state what ought to have been stated before, the amendment, even after a hearing, may be made by a supplemental bill.

Clark v. Keane, 46 N. Hamp., 272.
Dow v. Jewel, 18 Id., 340.
Doe v. Doe, 37 N. Hamp., 268.
Bellows v. Stone, 14 Id., 175.
Tilton v. Tilton, 9 Id., 394.

3d. If the Court has given leave to file a supplemental bill, the plaintiff may introduce other matters into it, which *might* have been incorporated in the original bill by way of amendment.

Stafford v. Howlett, 1 Paige, 200, 1.
2 Daniel, 1530, notes.

See, as to when *leave* to file is necessary:
Story Eq. Pl., § 333.

4th. The only questions legitimately presented for consideration by this record are:

a. Whether relations so unfriendly exist between the trustee and cestui que trust, that it is not fit he should continue to be trustee?

b. Whether he occupies a position towards her, and insists on rights or prefers demands against her, which are inconsistent with his duties as trustee, and require that he should cease to be so, and be left to assert his rights against her by suit in the proper Court?

c. Whether he claims a large fee from her, and she

denying that she owes it, and entirely contradictory statements on oath being the result, both the foregoing reasons for displacing him do not exist?

d. Whether his claim of a right to retain the bond payable to her, as a security for such fee, and by virtue of a lien, is not inconsistent with his chararacter as trustee, and reason for displacing him?

e. And whether he has, whether displaced or not, such right to retain a lien?

5th. Whatever the contract was, as to the amount of the contingent fee, there was no note or memorandum of it in writing, and it was not contemplated by either party, that it was to be or could be performed on either side within a year. Therefore it was of no effect by the statute of frauds in force in the District of Columbia.

6th. The contract was clearly champertous, and the law as to champerty has not been changed in the District of Columbia.

Thurston v. Percival, 1 Pick., 415.
Kenney v. Browne, 3 Ridgway Cas. in Parl., 462.
Strange v. Brennan, 10 London Jurist, 649.
Stevens v. Bagwell, 15 Ves., 139.
Wood v. Downes, 18 Ves., 120.
Strachan v. Brandon, Eden, 303.
Stanley v. Jones, 7 Bing., 369.
Lathrop v. Amherst Bank, 9 Mete., 489.
In re Masters, 4 Dowl. Pr. Cas., 18; 1 Harr. & Woll., 348.
Williams v. Protheroe, 5 Bing., 313.
Merritt v. Lambert, 10 Paige, 352.
In the matter of Bleakley, 5 Paige, 311.
Livingston v. Cornell, 2 Martin, 281.
Rust v. Larue, 4 Litt., 411.
Caldwell v. Shepherd, 6 Thos. Man., 389.
Key v. Vattier, 1 Hamm., 132.
Arden v. Patterson, 5 Johns. Ch. R., 44.
Satterlee v. Frazer, 2 Sandf. Super. Ct., 141.

7th. If the contract was not champertous, it is because success was to be certain, and then the fee was enormously exorbitant and extortionate, and such contracts cannot be sanctioned, made when the client is, by fear, doubt, and apprehension, under the lawyer's influence.

Walmesley v. Booth, Barnardiston, 478.
Draper's Comp. v. Davis, 2 Atk., 295.
Saunderson v. Glass, Id., 298.
Sayer's Law of Costs, 321.
Hobart, 117.

8th. Such charges of enormous sums for fees are not permissible to attorneys, counsellors, and solicitors, and they wound the honor of the profession and bring it into disrepute. It is the duty of every advocate to protect the widow and the orphan and not to despoil them; and when called upon for advice, he is to exercise a kind of domestic magistracy, founded upon the confidence and esteem of his clients, and to pronounce the first oracles of justice. The Right must always find in him a champion, and the Wronged a defender. He must neither maintain nor defend an unjust cause; and if, after engaging in one, he finds it to be such, it is his duty to abandon it, for the worthy advocate is *Juris et Justitiæ Sacerdos.*

Dialogue des Advocats du Parlement de Paris, in Dupin, Prof. d'Avocat, i., 258.
Boucher d'Argis, Hist. de l'Ordre des Avocats, Id., i., 19.
D'Aguesseau, Discours in 1698, Id., i., 551 to 554.
Ordonnance du Parl. de Paris, de 1344, Id., i., 67.
Code of Justinian, L. 6, de Judiciis (3, 1).
Bouchel, Bibliothèque du Droit Français, Id., i., 711.
Sir John Davies: Pref. to Reports, 25, 27.
Dupin, âiné, Profession d'Avocat, i., 39.
Ulpian, L. 1, §§ 10 & 12, ff. de extraord. cognit. (Dig. 50, 13.)
L. 6, § 2, Code, de Postulando (2, 6).
Code Theodos., i., x., 1.

9th. Anciently a counsellor-at-law could bring no action in any English Court; for his fee was not a debt, but an honorarium. This was law in the time of Coke and in that of Lord Hardwicke. The fees of counsel were *honoraria*, not *merces*.

Coke, i., Instit., 295, a.
Moor v. Row, 1 Rep. in Chanc., 21.
Thornhill v. Evans, 2 Atk., 331.
Chesley v. Beliot, 4 Term R., 317.
Newman v. Payne, 4 Bro. Ch. C., 352.
Aubrey v. Popkin, 1 Dick., 403.
Saunderson v. Glass, 2 Atk., 295.
Crossley v. Park, 1 Jac. & Walk., 460.
Dupin, âiné, Profession d'Avocat, i., 105 to 110, 147, 597, 599, 690, 698, 9. 715.
Camus, Lettre i. de la Profession d'Avocat, Id., 267, 273.

10th. As, if gifts or lucrative agreements, which physicians or surgeons obtain from their patients during their sickness, are repented of after recovery, the tribunals have the power to appreciate these agreements, and to reduce or annul them, according to circumstances; so advocates, having not less dominion over their clients, are subject to the same law, and cannot contract irrevocably with their clients, while they have charge of their interests, in cases not yet decided. This principle is applicable to solicitors, business-agents, and all others who, placed in circumstances where their services are indispensable, make of it an odious occasion for illicit gain, and extort from the unfortunate, for the time made dependent on them, excessive promises.

Chardon, Traité du dol et de la fraude, Nos. 620, 621.
L. 9. Code de Professorribus et Medicis (10, 52).
L. 6. Code, de Postulando (2-6),—the celebrated Law Quisquis.

11th. There are no transactions which Courts of Equity

will scrutinize with more jealousy than dealings between attorneys and their clients, especially when the latter are of inferior capacity and inexperienced.

Mills vs. Mills, 26 Conn., 217.
Ex-parte Plitt, 2 Wallace, C. C. Rep., 453.
Haight vs. Moore, 37 N. York Super. Ct., 161.
McMahon vs. Smith, 6 Heisk., 167.

12th. If the action of the Court is needed, it will disregard contracts for contingent fees, and allow counsel what, under the circumstances, the Court deems fair.

Remarks of Grier, Justice, in Ex-parte Plitt, 2 Wallace, C. C. R., 476, *a*.

13th. It is for the attorney to show that transactions between him and his client, by which the attorney is benefited, are just and fair, or purely voluntary.

Mason vs. Ring, 2 Abbott, N. S., 322.
Brock vs. Barnes, 40 Barb., 521.

14th. And a contract for a contingent fee must have been made in abundant good faith, *uberrimâ fide*, without suppression or reserve of facts, or exaggeration of apprehended difficulties, or undue influence of any sort or degree, and the compensation bargained for must be just and fair, and the transaction must be characterized throughout by all good fidelity to the client; or the Court will not hold such compensation to be valid.

Ex-parte Plitt, 2 Wallace, C. C. R., 473.

15th. The oral contract, on its face void under the Statute of Frauds, was not for any service presently to be rendered, nor were the counsel to engage in any litigation where the result would be doubtful. They were not to attempt, and they did not attempt, to "break the lease" for the forfeiture of the contract to build. They were to wait until, some time during the seven years unexpired, the lessees might possibly, by a breach of *another* covenant, clearly and indisputably forfeit all right; and *then* the counsel were

to sue. To call a fee "*contingent*," under this bargain, is an abuse of the word; and such a contract is void.

16th. The claim of the trustee in this case that he has a lien on the bond to Mrs. Cox for $38,000, in his hands since its execution and the conveyance in trust to him and Wilson, and the right to retain it as security for an exorbitant contingent fee, in a case where success was certain and inevitable, claimed by him to have been promised by her to the firm of Carlisle & McPherson, before their services as attorneys commenced, and which services had ended long before he became trustee, the fee, larger or smaller, being by agreement to be paid, not at any fixed time or on demand, but out of the proceeds of the land when she should have sold the same, is sufficient reason for removing him as trustee; because he has never yet withdrawn his prohibition of payment of any part of the *principal* of the bond to Mrs. Cox, and he has not admitted that he had not the right to forbid (as he did forbid) the payment of any interest to her.

17th. And he cannot retain the bond, because he has no lien, and no *right* to retain it;

First, because there is no valid contract and no indebtedness as claimed.

Second, because the bond was not received by him in his character of attorney or solicitor, nor in the course of his professional employment for Mrs. Cox, nor in the ordinary course of his business; but he received it in his character of trustee alone.

Stevenson vs. Blakelock, 1 M. & S., 538, per Gifford, arg. and Littledale, J., and Lord Ellenborough.
Ex parte Nesbitt, 2 Sch. & Lef., 279.
Champernown vs. Scott, 6 Madd., 93.

Third, because the terms of the alleged contract are wholly inconsistent with the existence of a lien, it being for payment of the fee at an uncertain future time, out of the

proceeds of the sale of the land, when she should sell the same.

Hilton vs. Bragg, 7 Taunt., 21, per Lens, Sergeant, arg.
The Case of an Hostler, Yelv., 67, *note*.
Cowell vs. Simpson, 16 Ves., 275.

18th. The counsel for the appellant said, below, that he did not ask a decree establishing the lien, which of course he could not have upon the pleadings; *but only a decree affirming his client's right to retain the bond*. That would be a decree establishing his lien.

19th. For the *lien* of a solicitor on the deeds and papers of his client *is merely a right to withhold the papers from his client, and not a right to enforce any claim against him*, and, as long as the client allows the papers to remain in the solicitor's hands, the lien is unavailing.

Blunden vs. Desart, 2 Conn. & L., 119.
Bozon vs. Bolland, 4 Myl. & Cr., 358.

20th. The lien of a solicitor does not depend on *contract*, but on the law.

Blunden v. Desart, 2 Conn. & L., 130.

21st. There is no proof that any suit was ever instituted in ejectment or otherwise, to enforce the forfeiture of the lease to Angus and Lewis, nor of the ground of forfeiture relied on, nor of any equity suit by them. All the oral testimony in regard to these suits was objected to as incompetent, and the objection is not waived.

22d. It is not fit that the appellant should continue to be trustee, holding the fee and claiming a lien on it in his own favor. He only wears the mask of a trust in order to have thereby an undue advantage of the beneficiary. If he has a lien, he could sell under it, and buy in the property.

There is a conflict of interests which incapacitates him and unfits him to be trustee.

Van Horne v. Fonda, 5 Johns. Ch. R., 509.
Davone v. Fanning, 2 Johns. Ch. R., 270.
Willard on Trustees, 187, 188, 194, 472.
Green v. Winter, 1 Johns. Ch. R., 41.
Howell v. Baker, 4 Johns. Ch. R., 120.
Willis on Trustees, 126, 121, 162.
Hill on Trustees, 535.
Henley v. Phillips, 2 Atk., 48.

23d. The removal of a trustee, at the request of the cestui, and the appointment of another person to sell the lands conveyed by the deed, is matter of discretion for the Court, and will not be ordered without good cause.

Ward v. Dortch, 69 No. Car., 279.

ARGUMENT.

This is one of those cases in which, for more than one reason, it is not pleasant to be engaged; but if an advocate believes that a woman is in danger of being wronged, and that a demand against her by counsel is unconscientious, and censure may thereby fall upon the profession, he has no choice but to defend and vindicate both.

In Welles v. Middleton, 1 Cox Ch. Cas., 113 (affirmed in the House of Lords as Middleton v. Welles, in 4 Bro. Parl. Cas., 245), Lord Thurlow said:

"If my private persuasion is, that none of that imputation does belong to the defendants in this business, yet that must not operate. Every man must come before me to be tried for what he has done in the transaction. It would be frivolous and useless to justice to do otherwise."

And as,

Omne animi vitium tanto conspectius in se
Crimen habet, quanto major, qui peccat, habitur;

and the errors and imprudencies of men of note and reputation are precedents for the worst practices in lower men,

they should be the more sharply criticized and censured by the Courts, because they are so much the more mischievous and dangerous, as their authors are of ripened intellect and distinction well earned.

We have endeavored to state the facts, as pleaded and proven, in this case, with juridical impartiality. The law and these facts we hope to discuss fairly, giving to no fact more than its due weight, and propounding no conclusions of law not demanded, or at least warranted, by the facts.

The three only witnesses as to the really material facts are the parties and Mr. Carlisle, all unimpeached and reputable persons, and all testifying directly in their own interest, each a witness in his or her own behalf. It is to be regretted that it is not possible to give credit to all, because of distressing conflict and direct antagonism in their testimony. No other course is open to us, therefore, than to discuss the case as if the parties were utter strangers to us, and to speak by the record alone, as if the actors were of another age, and no personal regard or sympathy could sway the judgment.

The single and simple purpose of the bill in this case is to divest the defendant of a trust, which he ought never to have accepted, or long ago to have resigned. The reasons which show and the facts which establish his unfitness; the gross impropriety of insisting upon clinging to the trust, are stated in the bill, its amendment and supplements. Originally one of the trustees under a deed to secure the payment of a bond for $38,000, he made himself also one of the trustees under three deeds to secure $13,000 of the same indebtedness assumed by a vendee of the original vendees, and $3,000 to third persons, besides, for money raised to be paid to his client, and he received at the beginning, and still holds the bond for $38,000, the annual interest upon which is payable to her; and he refuses to give it up to her, because he claims that he holds it, not as trustee but as her attorney and solicitor, by virtue of a lien upon it, and as security for a fee of $5,000, which she stigmatizes

as exorbitant, unjust, unrighteous and extortionate; as positively and unequivocally denying on oath that she ever offered or agreed to pay that amount, or any more than $2,500, as he and his partner swear that she did offer and agree to pay $5,000.

As to the questions in regard to the functions and requisites of a supplemental bill, it cannot be necessary to do more than refer to the authorities.

The object of the bill is single and simple. It is to have a trustee displaced, and the supplemental bills state additional facts, concurring with those stated in the bill and amendment, to show that it is not proper that Mr. McPherson should continue to be trustee.

As a consequence of the displacement of the trustee, it is prayed that he may surrender the bond for $38,000, payable to the complainant, and which he received as trustee.

There is nothing in the supplemental bill that does not tend to this principal object and that consequence.

These are but small and vermicular questions, which seem to us singularly inappropriate to a case like this, and we pass them without further comment.

The principal question is, whether it is fit and proper that Mr. McPherson should continue to be trustee. Another, and the only other is, whether, displaced or not, he shall continue to withhold the bond from the sole obligee, to whom, by its terms, interest is payable annually.

Mr. McPherson claims that it is entirely fit that he should continue to be trustee. And as to the bond, he does not claim that he must be continued as trustee, in order that he may retain it, for he does not hold it as trustee. He claims the right to hold it as a substantive and independent right, whether he shall be displaced or not.

To establish his unfitness, complainant alleges that most unfriendly relations exist between them, caused chiefly by his assertion against her of a claim in behalf of himself and his partner, in their character of attorneys and solicitors, which she regards as extravagant and unjust; (by virtue of

which he claims a right to hold the bond as security for the fee claimed, having a lien on it therefor,) and that, in the assertion of this right he had forbidden her debtor to pay her the interest overdue and accruing on the bond. Also, that he has neglected to see to the punctual payment of the interest, or to the payment of the taxes, and that the houses on the three lots held in trust under the conveyance of Pike be kept insured.

He answers, "It is not my duty to see to any of these things; I did forbid the debtor to pay you anything, but as to the interest I revoked my order before you filed your bill; I do claim a right to hold the bond, as security for what you owe us as your lawyers, and to have a lien on it; and the fee that I claim is not exorbitant, and you offered it voluntarily, and agreed to pay it out of the proceeds of sale, when you should sell the property. You offered and agreed to pay $5,000."

She replies, "All that has nothing to do with this case. But I agreed to pay only $2,500, and even that is exorbitant, and I shall ask protection of the Court against your claim, for even that. The services were not worth more than five hundred dollars."

The question how much she did offer and agree to pay cannot be tried, because there is no issue as to the fact, and because there cannot be; the fee, whatever its amount, being due to Carlisle & McPherson, and the former not being a party to the suit, to be bound by a decree.

The counsel of McPherson says that we should have made him a party. Become *Actor*,[1] asserting a negative, "I did *not* agree to pay you $5,000, but only half of it." It was a shrewd device not to make the answer a cross-bill, or call on the complainant to answer as to the fee. If that had been done, the complainant's answer would have been evidence. If it could be so managed as to get *her* to make Mr. Carlisle defendant, and so raise a direct issue as to the contract, then the answers of Messrs. Carlisle and McPherson would be evidence.

The *notion* of the appellant is, that if Mrs. Cox did agree, before the suit was commenced, to pay $5,000, *there could not be extortion* in the matter, and the fee is not exorbitant. The *law* is precisely the reverse. It is *just such contracts*, for contingent fees, made before service rendered, or before the litigation ends, that the law especially hates and nullifies.

There is no issue as to the amount of the fee, i. e., what sum she contracted to pay. Carlisle & McPherson claim $5,000, and $1,000 for Mr. Cox. She *regards* it as exorbitant, unjust, extortionate, and denies that she promised to pay it. The consequence is enmity; for which, and antagonism of interest, it is fit that Mr. McPherson should cease to be trustee.

To establish a lien, or right to retain papers as security, a valid indebtedness must be first established. She admits owing $500, or what their services were worth. They claim a right to retain for $5,000 and interest. But as the question *how much* she owes them cannot be tried in this suit, the question is whether Mr. McPherson has a right to retain, as a lien, for security for her indebtedness, larger or smaller.

The alleged promise is evidenced by no writing whatever.

Two objections to it present themselves at once, either of which is fatal, whether the promise was for $5,000 or $2,500. As to the first, it matters not whether the fee promised is larger or smaller. As to to the second, the larger the fee the more fatal the objection.

1st. There being no note or memorandum in writing of the pretended agreement to pay $5,000, it has no legal validity. It cannot be proved by parol. For neither on one side or the other was it contemplated that it was to be performed within a year.

2d. The alleged agreement is champertous.

A written agreement by a client, that his attorney should reserve for all his services ten per cent. upon the sum which should be recovered, is unlawful. It comes within the definition of champerty, as contained in the Statute of *Westminster* 1, in every other respect than that of being

committed by some officer of the King. It is *malum in se*, and an offence at the common law.

Thurston v. Percival, 1 Pick., 415.

In Walmesley v. Booth, Barnard., 478, Lord HARDWICKE said that attorneys and solicitors are to be considered as public officers and ministers of justice. They are under the government of the Courts in regard to their behavior to their clients. The Courts exercise a much larger authority over them, and interfere much more in contracts which they make with their clients than they do in other cases. For which reason the Courts, both of law and equity, and especially the Courts of law, have certain rules to regulate their behavior, both with regard to their method of proceeding, and to the satisfaction which they are to receive from their clients. And if an attorney extorts more money from his client than the Courts allow of, or makes a contract with his client to have more money, the Courts will give relief.

And he acted on these principles, also, in The Drapers' Company v. Davis, 2 Atk., 295; and Saunderson v. Glass, *id.*, 298.

See, also, Sayer's Law of Costs, 321; Hobart, 117.

In Kenney v. Browne, 3 Ridgew. Cas. in Parl., 462, a grant of a fee-farm, part of an estate in suit, by client to attorney, was set aside. The Lord Chancellor vindicated the common law and statutes in regard to champerty, saying, that the statutes had fallen into disuse, and adding: "In my judgment, that disuse has been essentially injurious to society, and I should wish to see some public examples of men prosecuted to justice for breach of these most salutary laws." But, he said, "the spirit of them has been uniformly enforced by Courts of Equity, and I do not know that a single instance has occurred, in which these statutes have been violated, where a Court of Equity has refused to interpose, for the relief of the party who has been injured."

Lord Yelverton characterized the transaction as "one of those shameless and abominable acts of fraud and plunder that have brought disgrace and scandal upon an honorable profession. I cannot but wonder," he said, "that any professional man would venture to submit such a cause to public discussion."

See, further, Strange v. Brennan, 10 London Jurist, 649, where the client agreed that the attorney, besides retaining for five years a portion of the fund to be recovered (to indemnify sureties procured by him, for her, on her administration bond), was to have ten per cent. on the sum recovered, exclusive of law-charges. To his bill for specific performance of this, demurrer, and dismissal. The Lord Chancellor said: "Is it not exact champerty? It is to divide the produce of a suit. . . This is not such an agreement as should have been entered into. I cannot think that the Vice-Chancellor hesitated very long as to allowing the demurrer." This was decided in 1846.

In Stevens v. Bagwell, 15 Ves., 139, Sir William Grant said: "The agreement was void from the beginning, as amounting to that species of maintainance, which is called champerty; viz., the unlawful maintainance of a suit in consideration of a bargain for part of the thing or some profit out of it."—(156.) The transaction was an assignment to navy agents, of one-fifth of certain prize-money sued for.

Sir Samuel Romilly, of counsel, said: "As to the assignment, it is impossible that such an instrument can stand, in a Court of Equity. In justice and conscience such exorbitant terms *are not to be defended*. The transaction is directly that worst species of maintainance, called champerty; a contract to carry on a suit upon the terms of receiving a certain portion of the property which is in dispute, if it shall be recovered."—(151.)

See, also, Wood v. Downes, 18 Ves., 120, where Lord Eldon said: "As a guardian cannot take anything from his ward pending the guardianship, or at the close of it, or

at any period, until his influence has ceased to exist, the obligation upon an attorney to refrain from taking an extraordinary benefit is at least as strong;" and cited Strachan v. Brandon, 1 *Eden*, 303, where Lord Northington said of a transaction, that, though not strictly champerty, it was so near, that it would not be permitted to prevail; declaring that it *savored* of champerty, and was therefore dangerous to public justice.

See, also, Stanley v. Jones, 7 Bing., 369.

In Lathrop v. Amherst Bank, 9 Mete., 489, an agreement to allow an agent, employed to prosecute claims for a bank, five per cent. on all he might recover, and otherwise only his actual expenses, was decided to be champertous.

In re Masters, 4 Dowling's Pr. Cas., 18, was on an application to tax an attorney's bill. It was held to be no answer to it that the attorney was, by agreement, to receive one-half the proceeds of a suit carried on at the client's instance. COLERIDGE, J., said: "It is impossible to say that the agreement here stated, which is substantially champerty, can be upheld, so as to prevent the attorney from being bound to submit his bill for taxation. The agreement is that he shall have one-half the proceeds of the action. That is an agreement which the Court cannot sanction."

Same case, 1 Harr. & Woll., 348.

The Statutes 3 Edw. i., ch. 25, and 28 Edw. iii., against champerty, are quoted in full in *Williams* v. *Protheroe*, 5 Bing., 313. The latter statute reads, "The king willeth that no officer *nor any other*, for to have part of the thing in plea, shall take upon him any businesses that are in suit."

In Merritt v. Lambert, 10 Paige, 352, the client agreed to give the solicitor all the rents and profits of the premises, pending the litigation, in addition to what he might receive from the defendant and what might be recovered from the

complainant. That is, the solicitor swore to this, and the client on oath denied it.

The Chancellor said, "I think the agreement is such an one as this Court cannot permit one of its solicitors to make with his client. . . . . Counsel may stipulate for a reasonable reward for his services as such counsel. But he is not permitted, either as attorney or solicitor, or as counsel, to contract with his client, previous to the termination of the suit, for a part of the demand, or subject-matter of the litigation, as a compensation for his services. . . . . Again, the alleged agreement was void as being contrary to public policy, as it placed the interest of the solicitor directly in conflict with his paramount duty to his client. . . . And no Court which has a due regard for the rights and interest of its suitors can sanction an agreement which puts the interest and the duty of an attorney or solicitor in opposition to each other."

In the matter of Bleakley, 5 Paige, 311, the Chancellor said of the solicitor, "He applied to the petitioner to purchase his demand, for the purpose of instituting a suit thereon, in violation of the statute, and of his duty as a solicitor of this Court. And if he had succeeded in this object, it would have been the duty of the Court, upon proof of the fact, to have stricken his name from the roll of solicitors. *If there was any express or implied understanding that he was to have any part of the claim in litigation*, in addition to his legal costs and expenses in the suit, if he succeeded in collecting the demand, that agreement was equally improper, *as tending* to champerty and maintenance."

That case was one of the collection of a judgment for money, the client offering to give one-half of what the solicitor might collect on the judgment.

In *Livingston v. Cornell*, 2 Martin, 281, the Supreme Court of Louisiana, after examining the Roman and French law, decided that an attorney or counsellor-at-law might sue for remuneration for his services; but their real value

was not to be fixed by any previous contract or agreement, but might be established by the allowance of the client, *after the services were performed*; that it cannot, *in any case*, rest on an agreement depending on the issue of the suit; and much less can a contract of *no purchase no pay* be the ground of an action. And, the matter in dispute there being a judgment for money, carried to the Supreme Court of the United States, the Court held that to claim 10 per cent. of the amount was to claim part of the matter or thing in dispute.

The *reasons* given by the Court in this case, for frowning upon such contracts, are worthy to be noted, as applicable to the present case.

In Rust v. Larue, 4 Litt. 411, Ben. Hardin had made a contract to attend to a suit, for a third of all the slaves or money that might be recovered. The court held it champertous, although they held that success was doubtful and the contract fairly made, and not unconscientious, and the compensation reasonable, and after re-hearing granted, and re-argument by Mr. Hardin in person, the decision was adhered to.

See also Caldwell v. Shepherd, 6 Th. Monroe, 389.
Key v. Vattier, 1 Hamm. 132.

In Arden v. Patterson, 5 Johns. Ch. R., 44, the Chancellor quoted and approved Strachan v. Brandon, Eden, 303, where the Lord Keeper ordered a bond, taken by an attorney, to be delivered up as unreasonable, savoring of champerty, and dangerous to public justice; and Wood v. Downes, 18 Ves., 120; and said there were numerous cases, in which, upon principles of policy, the court will not suffer a contract between an attorney and the client to stand. There would be no bounds, as Lord Thurlow observed, to the overruling influence of the power of an attorney if it were not so.

In Satterlee v. Frazer, 2 Sandf. Super. Ct. Rep., 141, it was decided that a contract with an attorney-at-law, employed to collect a debt, to give him a part of the debt as a

compensation for his services in collecting it, was void; referring to the cases in New York cited above, and to Wallis v. Loubat, 2 *Denio*, 607, and Berrien v. McLane, 1 Hoffm. Ch. R., 421.

The Roman Law, as we shall see, equally condemned champerty, the *pactum de quotâ litis suspensâ lite*.

If the contract in this case, as it is stated in the answer and testimony, is not champertous, that can only be because success was to be certain and compensation certain; because the only contingency was whether a breach would by and by occur; because the fee of such a part of the proceeds of the land when it should be sold was not contingent; and in that case it was craft and overreaching to lead or permit her to believe that the result was uncertain. The contract must be impaled on one horn or the other of the dilemma.

In Ex-parte Plitt, 2 Wallace, C. C. R., 453, the Court said: "The practice of stipulating beforehand for professional fees, contingent on the result of the litigation, is not a practice to be generally commended. . . . Such contracts may sometimes be necessary, . . . and where they have been made in abundant good faith, *uberrimâ fide*, without suppression or reserve of fact, or exaggeration of apprehended difficulties, or undue influence of any sort or degree, and where the compensation bargained for is absolutely just and fair, so that the transaction is characterized throughout by all good fidelity to the client, the Court will hold such contracts to be valid. But it is unnecessary to say that such contracts, as they can scarcely be excepted from the general rule which denounces as suspicious the dealings of fiduciaries with those under their protection, must undergo the most exact and jealous scrutiny before they can expect the judicial ratification."

Mr. Justice Grier, present at the argument, said that these contingent fees were very delicate affairs. They were not allowed at all in England, and had given rise in our country to great abuse in some instances. Still, perhaps, they would have to be tolerated a while longer, especially

in the country. This much he would say, that if the action of the Court were needed, it would disregard such a contract, and allow counsel what, under the circumstances, the Court deemed fair.

Id., 476.

See to same effect, Haight vs. Moore, 37 N. York, Super. Ct., 161.

McMahan vs. Smith, 6 Heisk., 167.

There are no transactions which Courts of Equity will scrutinize with more jealousy than dealings between attorneys and their clients, especially when the latter are of inferior capacity and inexperienced.

Mills vs. Mills, 26 Conn., 217.

The presumption of law is against the attorney; and it is for him to show that the transactions between him and his client, by which he is benefited, are just and fair, or purely voluntary.

Mason vs. Ring, 2 Abbott, N. S., 322.

Brock vs. Barnes, 40 Barb., 521.

The appellant does not endeavor to *prove*, he does not even venture to say, that the services rendered in the suit were, in point of labor, trouble, and responsibility, of the exercise of ability or the application of knowledge, worth any such fee as he claims. He does not produce the record to prove what he did do. He says that the fee was *contingent*, and that in such cases, of which much of his business has consisted, 25 per cent. is an ordinary fee; and he claims that she *gained*, by his services, $23,000, because she afterwards sold the land for $38,000, having at first sold it for $15,000.

There *was* no contingency. That is evident, because success was to be certain before any suit. In the matter of doubtful claims against the Government, where the labor is great and delay is great, and recovery uncertain, twenty or twenty-five per cent. is, perhaps, a common fee. But it

would be a grave and alarming abuse if such suits as that for which *this* fee is demanded should come to be regarded by the Bar as of the same nature. In doubtful lawsuits, formerly, in Virginia and Kentucky, lawyers became rich by contingent fees, in cases where there were conflicting calls and imperfect and doubtful surveys. But it will never do to get rich by demanding such fees in suits where there is no doubt of success; and Mr. McPherson admits, fatally for himself, that there was no doubt in Mrs. Cox's case that the failure to erect buildings did not work a forfeiture; *and that he was to wait and did wait until there was a clear breach*, before he sued. He does not dare to allege that there was any serious and vigorous defence.

But it is not of the least importance in this case whether she proposed and offered to pay either one sum or the other. That he claims what she denies and disputes; that she declares the claim exorbitant and extortionate, are reasons sufficient and grounds sufficient to relieve him of the trust, and to put another in his place.

So much the worse for him and his partner, if they did permit her to agree to pay them five thousand dollars. It would be better for them that *she* should be believed, and not they; nay, that it should be concluded that they did not accept from her an agreement to pay even the smaller sum.

His answers and his testimony are very far from being what they should have been. On the main points they are not frank and fair; they are argumentative, ill-natured, and sometimes, as when he speaks of her faithlessness and untruthfulness, they are coarse. When she testified, a long, rambling, useless, impertinent, and pointless cross-examination manifested the same animus.

Evidently the notion possesses the mind of the appellant that there can be no question of the right of himself and his partner to recover *any* sum whatever, without any reference to the value of their services, if they prove by their own testimony an oral agreement to pay it. He is grievously mistaken.

It is very evident that the case was one in which success was to be certain; and there was no *contingency* about the fee. And it is very evident that the fee was, even if only $2,500, five times too large. The Court cannot know what the record of the suits would disclose. Was there a *trial* in the ejectment suit? Was there any sort of equity in the injunction bill, or the least difficulty in expelling it from the Court? What *was* the breach that was made the ground of recovery in the ejectment suit? *Was* the failure to erect buildings *not* a cause of forfeiture? and was it not the very ground on which, without difficulty, the judgment was obtained?

That Mrs. Cox has not paid Carlisle and McPherson is not in the least degree a just cause of complaint. She was to pay out of the proceeds of sale of the property, when she should sell and realize. She sold for $38,000, payable at the end of ten years. She has had little or no other means of living than the interest annually accruing on the bond, and she has had a family to maintain. Besides the interest, she has collected but $2,000 in money, of the principal, and of that she paid Mr. McPherson $1,000; and has had to pay off the note of Pike for $1,000, held by Kendall; and, when this suit was heard, there was due her, chiefly in consequence of the prohibition of McPherson, by Ford, some $2,000 of interest.

The whole cause of the anger and vindictive bitterness displayed by Mr. McPherson, in his answers and testimony, is the denial by her that she ever agreed to pay $5,000. It does not matter, as to effect in the suit, whether she did or not. She has learned her rights, and that her offer to pay $2,500 had no sufficient cause or valid consideration, and that she does not legally or justly owe it; and against even *it*, she has claimed the protection of the Court.

It is time that the authority of this Court should be invoked to condemn and arrest the abuses that have so multiplied and increased in the legal profession, in regard to fees and compensation, as to have brought it into deserved disrepute.

We know of no higher duty than to vindicate the honor of the profession, and to clear and acquit it of the aspersions that ill-practices and greed in those who are its servants, have too often, nay, too commonly, in these later years, caused to be cast upon it.

FIVE THOUSAND DOLLARS! and this with interest demanded upon it for six years or more, *i. e.*, 36 per cent., or $1,800, in addition to $1,000 for Mr. Cox, of course with like interest, (or $360); in all, at the date of the decree, $8,160!

Five thousand dollars!—only $1,000 less than the annual salary of the Circuit Judges of the United States, for incessant and laborious services; the exact amount of the annual compensation of the District Judge of California, of an Assistant Attorney-General, the Solicitor of Internal Revenue, a Comptroller of the Treasury or of the Currency; $500 more than that of the District Judge of Louisiana, the Judges of the Court of Claims and the Commissioner of Patents; $1,000 more than that of some District Judges, and $1,500 more than that of some of them; $1,000 more than that of the Solicitor of the Treasury, the Commissioner of the General Land Office, the Commissioner of Pensions, the Auditors and Registers of the Treasury and the Assistant Postmaster-General; $1,500 more than that of the Naval Solicitor; $2,000 more than that of the Commissioner of Indian Affairs; $1,000 more than that of the Associate Justices, and $500 more than that of the Chief Justice, of the Court in which the services were rendered.

And this, in a case wherein there was no possible doubt of success; in ejectment to be brought for a clear and undeniable breach of an unambiguous covenant by a lessee, *when the breach might happen*, which breach, when it did happen, *was* a forfeiture of the lease; a case in which there was to be no possible doubt of success, no possible *contingency* as to the fee; in which there could not have been a single question of difficulty, nor any necessity for learning or the exercise of ability, beyond those possessed by the commonest attorney;

in which there *could* not be actual labor to the value of more than a very inconsiderable sum, and which could require and consume but little time; a case at law and an idle suit in equity that required only a motion to put it out of Court; *and the record of which case Mr. McPherson has not dared to lay before the Court from whose decree he appeals.*

And this enormous and unconscientious fee, demanded for himself and Mr. Carlisle, who would not go into the Court, by counsel who could not trust himself to manage, or whom his client was not willing to trust to manage the defence against so lean, thin, poor, and pitiable a bill as that must have been, of which he has not ventured to give any more than a mere passing mention, but other counsel had to be employed to assist him, and to him $1,000 more to be promised.

And the appellant even had to take time to consider whether he and his partner would accept the offer of the heroic widow, "a mother striving to provide for her children, a woman struggling with the hard business of the world," one who had his sympathy and regard, and who loved his partner like a brother! After deliberation he concluded to accept the offer, and permitted her to agree to pay $5,000 for services that *could* not be worth more than $500!

She was let, if not made, to believe, too, that there were great difficulties in the cases. Else why did she desire and propose (if it be true that she did so) to have additional counsel employed? And how should she have had "hopes and fears" intermingled, when the result was as certain as the regular risings of the stars?

Let us frankly admit, what all the world knows and talks of, that the exorbitant and disproportionate compensation now too often demanded by lawyers, the rapacious extortions so too-commonly practiced, even at the expense of those whose weakness and wants make the extortion essentially criminal, have become the shame, the disgrace, and the scandal of the profession.

Tout droit blessé trouvera parmi nous des defenseurs, is the motto of the Order of Advocates of Paris. Ulpian styled the Roman jurists, *juris Sacerdotes*: and Dumoulin, the greatest of all the French jurisconsults, had for his device, VERITAS VINCIT.

Estienne Pasquier, Councillor and Advocate of the King in the Chamber of Accounts, and Ancient Advocate in the Court of Parlement, said to the sons of Antoine Loysel, at the end of the Dialogue des Advocats du Parlement de Paris, published in 1602: "Exhorting you, above all, to be the defenders of the innocent, of *widows* and of *orphans*, against the oppression of the powerful, according to the Commandments of God. Finally, you are to strive to preserve for our Order the rank and the honor which our ancestors acquired for it by their merits, and by their labors, that you may transmit these to your successors."

Dupin, âiné, Profession d'Avocat, i., 258.

M. Boucher d'Argis, in his *Histoire abrégée de l'Ordre des Avocats*, has written these sentences:

"The first quality of the advocate is to be a man of worth. He should make the most exact probity his profession; honor and delicacy of sentiment should be the rule of all his actions; otherwise he cannot hope to acquire the esteem of the magistrates and of the public. He ought to be versed in jurisprudence, that he may know what is just or unjust, and employ his ministry in sustaining only what is founded on law or equity. . . . To exercise worthily this profession, it is necessary to feel the nobility and importance of his functions, and well to know the whole extent of his duties.

"It may be said of advocates that they pronounce the first oracles of justice, because controversies are commonly submitted to them before being carried into the regular tribunals. It is to their enlightened judgment that the most sacred rights are submitted, to be abandoned or maintained, according to their opinion. Their fellow-citizens, the inhabitants of the most distant provinces, all who are most great in the various Orders of the State, even foreigners, come to consult them as the wise interpreters of the

laws. Among these they exercise a kind of domestic magistracy, founded upon the confidence and esteem of their clients, and two parties with conflicting interests are often seen to unite in taking their opinions as arbiters, and agreeing to abide by their decision.

"The ministry of advocates is not less glorious, when, speaking in the sanctuary of justice, they defend with zeal and courage the interests that are confided to them, whether they have to maintain the interests of princes and great statesmen, whether they have to defend the widow and the orphan, and protect the weak against an unjust power that oppresses him. They always have the advantage of being chosen to bring to light the truth, to instruct the conscience of the magistrates, to defend the life, honor, and fortune of their clients, and to secure the triumph of justice and innocence."

Dupin, âiné, Profession d'Avocat, i., 19.

The great Chancellor d'Agnesseau, in a discourse pronounced at the opening of the Hearings, in 1698, said:

"An Order as ancient as the magistracy, as noble as virtue, as necessary as justice, is distinguished by a character that is peculiarly its own; and it alone, among all the professions, maintains itself always in the fortunate and peaceable possession of its independence. . . .

"Fortune respects them. She loses all her dominion over a profession which reveres wisdom alone. Prosperity adds nothing to its good fortune, because it adds nothing to its merit; adversity takes nothing from it, because it leaves it all its virtue. . . .

"Riches may adorn another profession; but yours would blush to owe to them its splendor. Elevated to the high places of glory, you still remember that you are often indebted for your greatest honors, only to the generous efforts of a virtuous mediocrity. . . . You are fortunate in owing neither dignities to wealth, nor wealth to dignities."

"Merit," he said, "which is the only ornament of your profession, is the only thing of value that is not purchaseable; and the public, always free in its suffrage, *gives* glory, and never *sells* it. . . . Your greatness is always your own work, and the public advances in you only yourselves. . . . All your days are marked by the services that you render to society. All your occupations are the exercises

of uprightness and probity, of justice and religion. The country loses not one of the moments of your life; it even profits by your leisure, and enjoys the fruits of your repose.'

Dupin, ainé, Profession d'Avocat, i., 551 *to* 554.

The Ordonnance of the Parlement of Paris, of 11th March, 1344, required of the advocates of the Court an oath, of which these were articles:

That they would not knowingly be of counsel in unjust causes.

That if after engaging, they should find the cause unjust, they would at once abandon it.

That they would not knowingly articulate impertinent facts.

That however great the cause might be, they would receive no more than thirty livres parisian for their fee, and would take nothing beyond that fraudulently; but might receive less.

That for small causes and the smallest, they would receive much less, according to the quality of the cause and person.

That they would make no contract to have a portion of what might be gained by the suit.

Dupin, Profession d'Avocat, i., 67.

2. Qûod ab initio vel ex post facto, cùm viderint causam esse injustam, statim eam dimittent.

II. Qûod non paxiscentur de quotâ parte litis.

So Bouchel gives these points of the old oath of the advocates, which contained twenty-three articles. The first was:

Qûod diligenter et fideliter istud officium exercebunt.

Dupin, Profession d'Avocat, i., 711.

And when the Romans had become Christians, the advocates took an oath in each case, to defend their clients with all their might, but not to defend knowingly a bad cause; and if in the progress of a cause they should observe anything vicious or unjust, they were allowed to abandon the

cause, and their testimony was in this case of such weight, that no other advocate could take charge of the case.

Code, L. 6, *de Judiciis* (iii., 1).

We hold that the lawyer should abide by the vows of the knight; and so good Sir John Davies thought, when, in the preface to his volume of Reports, after declaring that the law of Rome as to counsel-fees was the law of England also, he said "doth not this Profession every day comfort such as are grieved, counsel such as are perplexed, relieve such as are circumvented, prevent the ruine of the improvident, save the innocent, support the impotent, take the prey out of the mouth of the oppressour, protect the orphan, the widow, and the stranger? . . . Is not a worthy Professor of the law, a Star in the firmament of the Commonwealth? Is not his house, as it were, an Oracle, not onely to a Town or City, but to a whole Country round about him?"

Report of Cases and Matters in Law in Ireland, Pref., 25.

At Athens, the services of advocates were at first gratuitous. They were rewarded by being elevated in their turn to the offices of the Republic. Antiphon is said to have been the first who received remuneration from his clients, for the care that he took of their defence. Other orators followed his example, receiving of their clients honoraria in money and other presents. But still they were governed rather by a principle of honor than of interest, and those who displayed a mercenary spirit were severely censured for it, as we see in the orations of Æschines and Demosthenes.

At Rome, the service of the advocates was originally gratuitous; but as it became more difficult and more onerous, as laws and business affairs multiplied, the clients became accustomed to make presents to their patrons, to engage them to take charge of their causes.

To put an end to the abuses which this custom caused, the Tribune Cincius procured the enactment of a law, the

Lex Cincia, which forbade any patron or orator to receive money or any other present for any cause. This was renewed by Augustus. The Consul Silius, towards the end of that Emperor's rule, allowed advocates to receive honoraria from their clients; and Tiberius gave them the same permission; but Claudius restricted them to ten great *sestertia* (about $400). This was evaded; and Nero revoked his edict. Trajan revoked the law of Augustus, reviving that of Claudius, but added to it, that advocates should not exact the ten *sestertia, until after judgment in the cause.*

Justinian repealed this, and re-enacted the law of Claudius; and Constantine the Great forbade advocates to make with their clients any contract *de quotâ litis*, that is, to take a cession from the client of any portion of what he was to win by the event of the suit; on penalty of being deprived of his *status* as advocate.

Dupin, Profession d'Avocat, i., 39.

The Roman law said: "As to the honoraria of advocates, the judge is so to deal with them as to fix their amount with reference to the importance of the suit, and the ability of the advocate, and the custom of the district and of the Court where the litigation was to be: so that the amount do not exceed the lawful honorarium.

"If an honorarium has been guaranteed to any one, or if one has made a pact in respect of a suit, let us see whether he may have his action? And, in effect this is a rescript of our Emperor and his father:

"You will follow an ill custom if you shall claim that money has been promised you on account of a suit. But so the law is, if while the suit is undetermined, an obligation promises a joint interest in what may be gained. But if, after the cause is ended, an honorary sum is promised, it may be sued for, to the approved amount, although it may have been promised by way of reward for success (*etsi nomine palmarii cautum sit*): yet so, that what has already been given be computed with what is yet owed, and neither nor both together exceed the lawful amount." And the lawful amount for each separate case, is understood to be an hundred aurei (about $400)."

Ulpian. L. 1, §§ 10–12. *ff. de extraord. cognit.* (50, 13.)

Nullum cum eo litigatore contractum, quem in propriam regipit fidem, incat advocatus: let the advocate enter into no contract with the litigant whom he takes under his especial charge.

L. 6, § 2, *Code de postulando* (2, 6).

And the same law says: Let no one of those who may lawfully and decently receive honoraria, accept with disdain what the client may offer him.

We have changed all that; and lawyers' fees are no longer *honoraria*, but *merces*: and they may stipulate them and sue for them as other mercenaries may; but they do not get from under the strong hand of the Court altogether, nevertheless.

Advocatos qui conceleratis depectionibus suæ opis egentes spoliant atque denudant, non jure causæ, sed fundorum, pecorum, et mancipiorum qualitate, rationeque tractata, dum eorum præcipua poscunt coacta sibi pactione transcribi, ab honestorum cœtu, judiciorumque conspectu segregari præcipimus: That advocates who by rascally contracts despoil and make naked the needy, of their property, not moved by the right of the cause, but by the quality and number of farms, flocks, and slaves, when they ask decree transferring to them, by virtue of an extorted bargain the property of such clients, be expelled from the society of honorable men and from the presence of the Courts, WE DO COMMAND.

viii. Id. Mart. Constantinopoli, Constantino Augusto iii. et Constantio Coss.

Code Theodos. i. x., 1.

Depectiones, the Commentary says, are *turpes pactiones* et quidem Advocatorum cum clientibus suis.

A counsellor-at-law, Lord Coke says, cannot bring any action; for he is not compellable to be a counsellor, and his fee is honorarium, not a debt.

1 Instit., 295, a.

In Moor v. Row, 1 Rep. in Chan., 21, a counsellor brought

a bill for fees due him by a solicitor, and on demurer, his bill was dismissed.

In Thornhill v. Evans, 2 Atkyns, 331, Lord Hardwicke expressed great surprise that it could be imagined that a counsellor might demand his fees in a Court of Equity. "Can it be thought," he asked, "that this Court will suffer a gentleman of the bar to maintain an action for his fees, which is *quiddam honorarium*?"

See also Chesley v. Beliot, 4 Term R., 317.

"Neither," says Sir John Davies, "do our learned men of the law grow to good estates in the commonwealth by any illiberal means, (as envy sometimes suggesteth,) but in a most ingenuous and worthy manner. For the fees or rewards which they receive are not of the nature of wages or pay, or that which we call *salary* or *hire*, which are indeed duties certain, and grow due by contract for labor or services; but that which is given to a learned counsellor is called *honorarium*, and not *merces*, being indeed a gift which giveth honor as well to the taker as to the giver; neither is it certain or contracted for; no price or rate can be set upon counsel, which is invaluable and inestimable, so as it is more or less according to circumstances, namely the ability of the client, the worthiness of the counsellor, the weightiness of the cause and the custom of the country. Briefly, it is a gift of such a nature, and given and taken upon such terms, as albeit the able client may not neglect to give it without note of ingratitude, (for it is but a gratuity or token of thankfulness,) yet the worthy counsellor may not demand it without doing wrong to his reputation; according to that moral rule: Multa honestè accipi possunt, quæ tamen honestè peti non possunt."

Preface to Report, 27.

In Newman v. Payne, 4 Bro. Ch. C., 352, it was decided that a bond for unliquidated costs cannot be taken by an attorney from his client, even if it is secured by a mortgage. Lord Thurlow said, "An attorney cannot be permitted to take such a security. . . . Lord Hardwicke says that no advantage can be taken by an attorney of his client. In that case (Walmsley v. Booth) he would not allow it to stand as a security for the money actually due. . . .

Upon the general policy of justice, arising from the relation of attorney and client, the Court will not suffer it to stand."

See also Aubrey v. Popkin, 1 Dickens, 403.

In Saunderson v. Glass, 2 Atk., 295, Lord Hardwicke said "that a security obtained by an attorney, while he is doing business for his client, or whilst a cause is depending, appear to this Court in a quite different light than between two common persons; for if an attorney, *pendente lite*, prevails upon a client to agree to an exorbitant reward, the Court will either set it aside entirely, or reduce it to the standard of those fees to which he is justly entitled.

See Crossley v. Parke, 1 Jac. & Walk., 460, where this and other cases are cited and followed by Sir Francis Plumer, M. of the Rolls.

The Institutions (*Etablissemens*) of Saint Louis, made in 1270, provide, in chap. xiv., that the advocate shall make no bargain with him for whom he pleads, while the plea is pending; according to the law *Quisquis*, *Code*, *de postulando* (2, 6).

Philippe le Hardi, by an Ordonnance of 1274, ruled that the compensation (*salaires*) or honoraria of advocates should be proportioned to the suit and to the merit of the advocate, but not to exceed 30 livres, which was a considerable sum at that time, inasmuch as the marc of silver was then worth only about fifty sols; so that 30 livres came to about 600 livres of our money ($111.60), actual value. The Ordonnance of Philippe iii. also added, that advocates, in taking the oath annually, should swear to take nothing beyond these 30 livres, directly or indirectly, and those who should violate this oath should be marked as perjured and infamous, and by operation of law be excluded from the function of advocate, with power in the judge to punish them according to the quality of their malfeasance.

Dupin, Profession d'Avocat, i., 105.

Philippe le Bel, by an Ordonnance of the year 1291, forbade advocates committing any fraud in regard to their

fees, and, also, exacting on occasion of a difficult suit, a more considerable payment for other causes, to evade the limitation.—(Id., 106.)

In the Letters of 19 March, 1314, by which Louis Hutin confirmed the privileges of the Province of Normandy, he ordered that no advocate should receive for the greatest cause, more than 30 livres; and that, in causes less grave, the fees should be fixed by the judge, according to the quality of the cause, the usage of the tribunal, and the merit of the advocate.—(Id., 106.)

Brodeau mentions a Regulation of the Parlement, in 1463, which provided that advocates must not receive more than 30 livres for the conduct of a cause.—(Id., 107.)

But we find several instances in which the honoraria of advocates were fixed by the Court at larger sums, regard being had to the merit of the work.—(Id., 108.)

Charles du Moulin, in his Commentary on the rule *de verisimili notitiâ*, states that in the time of Charles VII., the Court allowed Maître Maréchal, an ancient advocate, 60 livres *parisis* for very brief responses to answers to complaints (*salvations*).—(Id., 108.)

The old Ordonnances used the term *salaire*, for the remuneration given to advocates; what was paid for the exercise of all the liberal arts was called so then. Afterwards the name of Honoraria was given to that which advocates received as remuneration for their labor.—(Id., 108.)

A memorable example of this is reported by Bouchel, in his *Bibliothèque du droit Français*, at the word *Avocat*. In 1579 he was present at a pleading with closed doors (*à huis-clos*), in the Parlement of Paris. M. Claude Mangot, interrupted by M. Pierre Versoris, in a passion said to him, "Monsieur Versoris, you have no business to interrupt me; you have said enough to earn your oats." Versoris, offended, demanded satisfaction. After the pleading was ended, and judgment pronounced, the First President de Thou said, "Mons. Claude Mangot, the Court has instructed me to say to you that what is given to advocates for their

labor is not in the form of oats, but it is an honorarium." M. Mangot was so overwhelmed that he was never well afterwards, and soon after died.—(Id., 108.)

Art. 161 of the Ordonnance of Blois, made in 1579, required advocates and attorneys to sign all writings made for parties, and below their signature to write and *paropher* with their own hand, what they had received for fee, and this on pain of being held guilty of extortion. In 1602, the Parlement decided that advocates were bound to observe this article, and that those who would not must be erased from the registry of matriculation, and interdicted from the functions of advocates.

This caused a great commotion among the Bar, for the advocates felt severely wounded in the honor of their profession "*because the honorarium offered to them for honorable labor was treated as a limited and mercenary gain, instead of being left to the discretion of the parties.*" So they met, to the number of 307, and with one accord resolved publicly to renounce their profession, and went by twos to the clerk to make that declaration, so that the exercise of justice was at once interrupted. The King had to interfere, by letters-patent which every one interpreted to suit him, the advocates one by one returned, and nothing more was said about the regulation. Other edicts renewed it, but it never was observed.—(Id., 109, 147.)

An arrêt of the Parlement of Bretagne, of 17 November, 1609, decided that advocates could not take notes or obligations for their honoraria.—(Id., 110.)

The laws and the customs, the old ordonnances and many old arrêts allowed advocates an action for the payment of their honoraria; but, according to the latest jurisprudence of the Parlement of Paris, and the actual (present) discipline of the bar, it is not suffered that an advocate bring such an action; and this is what results from the arrêt of 7 September, 1737, reported in Art. 73 of the Coutume of Artois. Advocates cannot retain the papers of their clients, in default of payment of their honoraria, as Mornac observes, (*Book I., ff. de pignoribus.*) —(Id., 110.)

Camus, in his first letter on the profession of advocate, says:

"The profession of a man who devotes himself to the study of the laws, only in the base hope of multiplying his riches at the expense of the unfortunate victims of chicane, the profession of him who has cultivated the orator's art, only to sell at a higher price the use of talents often dangerous and perfidious, are, one and the other, two professions diametrically opposite to that of an advocate. The exercise of the profession of advocate ought to lead to honor rather than to fortune. . . .

"The remuneration of these noble functions is the same as that of virtue. . . . It does not consist in fortune. Your son will receive honoraria; but certainly he will set too high a value on his zeal and vigils, to believe that they can have a valuation in money, and that a certain sum in gold can be a worthy remuneration for them. Honoraria are a present, by which a client acknowledges the pains which have been taken in the investigation of his case; it is not extraordinary to fail to receive them, because it is not extraordinary to meet with a client without gratitude; *but they are never sued for, in any case whatever. Such a suit would be incompatible with the profession of advocate; and at the moment when it was instituted, it would be necessary to renounce the profession.*

"The extent of the law which we have imposed on ourselves, not to exact honoraria, is developed in these terms by one of our ancient presidents: 'Those,' he says, 'who should have the temerity to sue for honoraria would be struck from the roll. But it must not suffice us not to institute suits; we must refrain from obliging our clients, by our conduct towards them *while they actually have need of our assistance*, to compensate us beyond what they had intended.'"

Dupin, Profession d'Avocat, i., 267, 273.

The Imperial Decree of 14 December, 1810, (title iv., art. 36,) made the following regulation: "We expressly forbid advocates to sign consultations, memoirs, or writings which they have not made or counselled upon; and we equally forbid them to make contracts for their honoraria, or to force parties to recognize their services before the

pleadings, under the penalty of reprimand for the first offence, and exclusion or erasure in case of repetition."

43d. In the absence of regulations, and for objects not provided for in existing regulations, we require advocates themselves to fix their honoraria, with the discretion that ought to belong to their ministry. In case the amount fixed should exceed the bounds of a just moderation, the Council of Discipline will reduce it, regard being had to the importance of the cause and the nature of the work; and it will order restitution, if the case requires it, with reprimand.

Dupin, Profession d'Avocat, i., 597–599.

The Ancient Constitution of the Order of Advocates said:

"The disinterestedness embraced by advocates extends to the interdiction of any action for the payment of their honoraria, *and even so far that they should refuse to recognize as confrères those who under this pretext should retain possession of papers or titles.* Convinced that they have done infinitely more for their clients than these can do for them, they neither mean to set a money value on their services, nor to exact remuneration for them. The taxation thereof by the Court is for the pleader who demands honoraria against the party, and not for the advocate who receives them freely from his client. This scrupulousness often makes him the victim of ingratitude and bad faith; but the sacrifice is that of virtue, and we sometimes meet with persons who respond by their gratitude to this sublime generosity."

Dupin, Profession d'Avocat, i., 690.

Replying to an English writer, (Manual Practice of the Chancery,) Dupin says:

"It is possible that the usage of which the English writer speaks is only a prejudice; but this prejudice has had a salutary influence on the splendor of the French Bar. It is not pretended, in France, that an advocate has not a right to an honorarium as the price of his labors. There has never been a refusal to allow it to those who have claimed it. In many Bars these suits are even tolerated. But the Bar of Paris has shown itself more severe; and not only formerly, but still to-day, any advocate of the Court who should sue

a client for payment of honoraria would be struck from the roll. . . . An advocate would have the right to compel a client to pay him for his services; but it is of the police of the Bar, that he who should bring such action would be liable to be struck from the roll. But the Courts have sometimes sustained such suits; as the Parlement of Paris did in 1766, and the Court of Grenoble on the 30th of July, 1821."

Dupin, Profession d'Avocat, i., 698–699.

A writer in a work entitled *Reflexions d' un Militaire sur la profession d'Avocat* (1781) says, speaking of those, attorneys and others, who ought not to be admitted among advocates: "I would exclude all those whom Frederic called leeches and dangerous reptiles (*Sangsues et des reptiles dangereux*). Heineccius calls them *Vultures togati*;—they are accustomed to too large profits to content themselves with moderate honoraria. Insatiable in opulence, what would they be in the moderate condition attached to a profession which is distinguished by its disinterestedness and scrupulousness?"—(Id. 715.)

As the Normans, overthrowing the Saxon power in England, introduced the Norman-French as the language of the land, so they introduced the old Norman and French rules as to the fees of counsel; and the English law was, as we have seen, in the time of Sir John Davies, the same as that of the French Bar and the Roman Jurists.

And though suits are now maintainable upon contracts for fees, yet counsellors, solicitors, and attorneys are still in theory officers of the Courts, and enough of the spirit of the old law remains, as we shall see, to require the Courts to see that they do not contract for and exact exorbitant fees, especially if they are contingent on success, or virtually for part of what is expected to be won by the suit. And enough of the old law remains to make it impossible for such a fee as is claimed in this case to be extorted by the aid of a Court of Justice, even if the alleged contract were not void by the Statute of Frauds, because not in writing.

But there is another and a much higher principle, as much

the law now as it was at Rome, which utterly condemns this claim, upon grounds that commend themselves to the reason and the conscience of every enlightened Court.

It is said by Chardon, in his *Traité du dol et de la fraude*, as follows:

"Certain agreements are contrary to good morals, only by the unjust effects which they make a cause just in itself produce; such are those which individuals dictate, abusing the necessity in which a party is, of availing himself of their services, and inducing him to give or promise values larger than that which would be legitimately due them. This excess has no other than an illegal consideration.

"Thus, a physician, who exacts from his patient a donation, a sale, or any other bargain, commits an abuse of his profession so much the more revolting because the patient, in whose mind the idea of death has effaced all others, submits to the law made for him, however hard it may be.

"Independently of the special rule (of Art. 909 of the Code) other gifts or lucrative agreements which physicians, surgeons, &c., may obtain, from their patients, during the sickness from which these recover, remain subject to the general rule as to the freedom and cause of agreements, and if the sick, restored to health, conceive well-founded regrets as to that which they were made to give or promise, while they were at the mercy of the disease and the physician, the tribunals are still, at the present day, invested, as they were before the Code, with the right to appreciate these agreements, and to reduce or annul them according to circumstances.

"Law 9, Code, de Professoribus et Medicis (10, 52) is formal in this respect: Ea patimur accipere quæ sani offerunt pro obsequiis, non ea quæ periclitantes pro salute promittunt; (we permit the acceptance of what those who are cured offer for services, not those things which, in danger, they promise for health.) This rule, deduced from universal morality, has always been followed in France, and by all the Parliaments. . . . Upon the foundation of this law, the most unanimous jurisprudence has been established; it is taught by all our writers, ancient and modern; no one has contested it; and Domat has made of it a rule of public law.

"Among the decisions innumerable which the jurisconsults have collected, we shall refer only to the arrêt of 8 February, 1596, which reduced to 300 crowns the promise

made by a person afflicted, to his surgeon, for cutting him for stone in the bladder; that of 21 June, 1594, by which a plague-patient, cured by a physician, was adjudged to pay him only 30 crowns instead of 200, for which the physician had exacted his obligation; and that of 5th September, 1776, rendered against a surgeon of Chaillot, who, called in to treat the wife of a joiner, exacted, before beginning the treatment, her husband's note for 300 francs. A few days and little medicine sufficing for the case, the joiner recovered by suit his note and his costs, and had judgment. The surgeon, probably dreading the taxation of costs, appealed to the Parlement; but the judgment was affirmed.

"It would be the same with all other contracts; and, says Despeisses, 'because the sick might use the form of some other contract, to make the instrument executed by them valid, to avoid this fraud it has been enacted that *all* contracts, between the physician and the sick, or such other person shall be null.'

"Duplessis adds that the sick man who, during his sufferings, has made a donation to his physician, may revoke it after his recovery. An arrêt of 8 June, 1758, annuls a lease upon ground-rent of a farm, made by the Dame Savignac to the Sieur Lecompte, her physician, as also the acquittance of the rents and other acts passed between them. Finally, in the *Plaidoyers* of Corbin, ch. 3, and in the *Repertoire de Jurisprudence*, we read an arrêt of 13 June, 1607, which rejects the demand for damages of the Sieur Latrosse, a physician, founded on a promise to marry him of the Demoiselle de Lamberville, if he should cure her."

[The Civil Code declares physicians incapable of receiving gifts from their patients, only during the sickness followed by death. This, Chardon held, does not abrogate the old law, which had the same absolute rule, but also made such agreements subject to be annulled, when the patient recovered, "if the circumstances showed, in the conduct of the physician, abuse of his profession, and in that of the patient a blind submission to the immoderate greed of the physician."]

"In this conjuncture, in effect, any idea of generosity on one side and of gratitude on the other are banished. The sick man gives, solely that he may be cured; the physician

receives because he promises to cure. It is between them *do ut des*, characteristic type of commutative contracts. . . . And the fundamental rule of agreements is, that the contracting parties must be in an equal state of freedom; and certainly this necessary state of equilibrium does not exist between the physician who seems to the sick man the arbiter of his destiny, and the unfortunate who implores him for health, as though he were God. We cannot refuse to apply here Article 1116 of the Civil Code, and to recognize in the conduct of the physician 'such devices, that it is evident that, without these devices the other party would not have contracted.'

"There is a perfect analogy between the extortion of the physician and that of the usurer; that which the latter acquires with his capital, the other extracts by his reputation; and if the product of talents could be subjected to a mathematical proportion, like that of dollars, the public power would have set upon them a legal rate. What the law could not establish, the tribunals must. There is a moral rate, which the usages of the citizens among themselves have fixed, by which are measured all exchanges made of talents for money. This is what the law calls the arbitrament of an upright man, *arbitrium boni viri*.

"Advocates have not less dominion over their clients, than physicians over their patients. From this parity of influence, grow in law the same consequences as to the incapacity of advocates, like physicians, to contract irrevocably with their clients, while they have charge of their interests, in a suit not decided. The law *Quisquis*, 6, *Code de postulando* (2, 6), expresses this perfect assimilation. *Præterea nullam cum eo litigatore quem in propriam recipit fidem, contractum ineat advocatus, nullam conferat pactionem:* (moreover let not the advocate, with that litigant whom he has taken under his personal protection, enter into any contract, make with him any bargain.) And the gloss adds: *Ergo emere vel aliàs contrahere, cùm clientulo non potest: et est ratio quia omnia daret propter timorem litis, sicut infirmus propter timorem mortis:* (wherefore he cannot buy from or otherwise contract with his client; and the reason is, because he would give everything, out of fear of the litigation, as the sick man would out of fear of death.)

"The *Etablissements* of Saint Louis (King of France) contain the same rule (*ch.* 14); and it has constantly formed part of our legislation, up to the promulgation of the Civil

Code. Some of the ancient authors gave it too wide an extension, supposing in the advocate an absolute incapacity to receive from his clients any gifts at all, under any circumstances whatever, and even by will. Ricard and Henrys brought the doctrine back to its true meaning, to wit, to all agreements made during the pending of the suit entrusted to the advocate: *le plaid pendant*, is the phrase of the Etablissements of Saint Louis. The liberty of the client is not effectively subjugated, except in that time of perplexity.

"The Civil Code, it is true, has not specially renewed the prohibition; and we ought thence to conclude, in this case, as in that of the physician, that the bargain is not null by mere operation of law; and that if it contains no injustice, it ought to be upheld; but if the client would experience from it a very grave prejudice, the judges, imbued with the spirit of the old legislation, should in this prejudice see the proof that the advocate, in abusing his ascendancy over his client, has been guilty of a veritable fraud, and here also Act 1116 would receive a most just application. It is this motive that chiefly determined the Court of Besançon, in its arrêt of 15 Thermidor, Year 13, to annul the instrument obtained from the Dame d'Affry, by an official defender of Privas.

"In fine, the principle which serves as a basis for these rules makes them applicable to solicitors, business-agents, and all others, who, placed in a conjuncture where their services are indispensable, make of it an odious occasion for illicit gain, and extract from the unfortunate, for the time made dependent upon them, excessive promises. So all those would be annulled that were obtained under stress of an imminent peril, such as a fire, an inundation, an armed invasion: in all these cases there is neither consent nor contract; there are exaction, violence, and fraud."

Chardon: Traité du dol et de la fraude, iii., *Nos.* 620–621.

It seems to us that this case is clearly one in which an unfair and oppressive advantage was taken of the ignorance of law, the fears, and the implicit confidence of Mrs. Cox, to induce her to agree to pay a fee shockingly disproportionate to the value of the services to be rendered, and which is claimed in disregard of the highest duties of a

counsellor and solicitor. It seems incredible, if she offered $5,000, that either of the partners could have hesitated a moment to accept it, thinking it not large enough; and that one did hesitate or pretend to hesitate, and take time, professedly, to consider, is proven by one of themselves. Upon the face of the affair, it does not seem, it is impossible to think, that there was the least difficulty contemplated in the case, or the least doubt or uncertainty as to the result; or that to conduct the case, when the breach might happen, could require much labor, or any especial ability, knowledge, or eloquence. If there were difficulty, doubt, much labor, long litigation, disputed questions, it is not possible to perceive that from the pleadings and testimony; and Mr. McPherson should have produced the record, and by it have *proven* that they did not take advantage of their position, their relation with her, their influence over her, and her inexperience and natural ignorance of the difficulties of a litigation. Mr. McPherson says still that he considered it a doubtful case, and he acted then on the hypothesis that it was so; but he felt sure that the failure to erect the buildings was not cause of forfeiture, and for it he did not sue.

Thinking it a case of great complexity, grave doubt, and vast difficulty, she insisted that the conduct of the cause should not be entrusted to Mr. McPherson, and that Mr. Carlisle himself should take personal charge of it in the Court. She combated his reasons for not consenting to do so, persisted to the last, and as an inducement offered a large fee in case of success. He does not say that, *after he had done so*, he distinctly told her that he would *not* give personal attention to the matter in the Court; nor does he say *that she agreed to pay the fee without his doing so.* One cannot help thinking that a French advocate of two hundred years ago would promptly have said, "My friend, we will not listen to such a proposition. We will see you righted, but the remuneration you offer in so simple a case is offered by your inexperience and ignorance, is five or ten times too

much for the service to be rendered, and we must not cease to be entitled to respect ourselves, even if the laws and the rules of the Order of Advocates would sanction such a bargain."

Mr. Carlisle, upon her proposition to pay $5,000, *said no more* in refusal to give his personal attention to the case; but (it is the unmistakable result of his testimony), it being offered as an inducement to him to give the case his own personal attention and activity in Court, to *manage* and *conduct* it, he indicated a willingness to accept it *as a sufficient inducement*. In other words, he permitted her to suppose, and gave her the right to believe, that he had yielded to her urgings and to the inducement, and would assume personal charge of the case. "I told her," he testifies, "if this should be satisfactory to Mr. McPherson, WE *would undertake it, and do* OUR *best*."

Yet it appears that Mr. Carlisle never went into the Court at all. His name was not even signed to a pleading or paper, in any of the suits. He says that he was *consulted;* but what Mrs. Cox stipulated, and he by accepting the offer of the fee promised, was, that the matter should not be entrusted to Mr. McPherson, but should be personally attended to by Mr. Carlisle himself; and it was because he would not give personal attention, that Mr. McPherson, meaning it to be at Mrs. Cox's expense, associated Mr. Cox with himself, thus admitting that he feared to trust himself alone with the equity case, which turned out to be of no difficulty at all. If it *had* been, undoubtedly he would have informed the Court in what the difficulties consisted, and permitted it to see the bill.

When M. Guillaume Cousinot, a notable advocate, pleaded in the Parlement the case of the widow and children of the Duc d'Orleans against the Duc de Bourgogne, he took for his theme the words, *Hæc vidua erat, quam cùm vidisset Dominus, misericordiâ commotus est super eam* —(Dialogue des Advocats, in Dupin, i., 192.)

To exact exorbitant wages for services is as inconsistent

now with the character of a worthy and honorable advocate as it was in the days of d'Aguesseau and Sir John Davies; and it is as reprehensible now as it was then to oppress the widow and fatherless, by exacting even the full amount which one might without shame exact from others. It is as true now as it was under the Roman Emperors, when even Tiberius, Claudius, and Nero reigned, that "a scrupulous probity, a decency always maintained, because it is but the consequence of principles profoundly impressed on the soul, are the essential qualities of an advocate." And if the world *rirait au nez* of the advocate who now should tell it that the creed of his Order still is, as it was in the days of Camus, "Se sacrifier, soi et toutes ses facultés, au bien des autres; . . . devenir orateur pour faire triompher l'innocence opprimée; regarder le bonheur de tendre une main secourable au pauvre, comme une récompense préférable à la reconnoissance la plus expressionée des grandes et des rìches;" that his office is a private tribunal, where he adjudicates causes before engaging to defend them; that it would be a criminal use of his talents to employ them in palliating injustice; that in falling short of his duty, he would expose himself to loss of his reputation; and that the dominant passion of the advocate is the love for what is just, upright, and honorable.

If little or none of this can now be said of the profession and professors of the law, without exposing to laughter and derision him who should say it (as it must be sorrowfully confessed it cannot be, because, owing to many malign influences, it becomes constantly less and less true), it is not more the fault of the lawyers than of the Courts, which no longer frown upon practices that bring shame upon the profession.

It is time to apply the knife and actual cautery to effect the extirpation of what may be called the cancerous maladies of the body of the profession, which have so insensibly grown and multiplied as to be for the most part hardly to be considered causes for condemnation or regret; though in one of our great cities the estimable and honorable mem-

bers of the profession have found their prevalence and progress so alarming and so mischievous as to demand a resolute and vigorous attempt at reform; it having become no injustice to say of the general state of the profession there:

> Aude aliquid brevibus Gyaris et carcere dignum,
> Si vis esse aliquis.

And nothing in this case is so noteworthy as the confident boldness with which an unconscientious bargain is pleaded, and the apparently utter unconsciousness that there is anything in the bargain, or in the manner in which and the circumstances under which it is alleged to have been made, at all out of the usual course, at all liable to unfavorable comment; for it indicates reliance upon a general opinion of the profession favorable to such dealing, and upon the indifference or easy indulgence of the Courts; and that it is no unusual thing for contracts like it to be made and to be enforced.

One of the great English or French lawyers would have found it difficult, we think, to gain his own consent to prove *by his own oath, against the positive oath of his client, and unsustained by a single fact or even a trivial circumstance*, that he had permitted a widow who trusted him and regarded him as a true and loyal friend, "a widow bent on discharging a trust committed to her by her husband, a mother striving to provide for her children, a woman struggling with the hard business of the world," to promise to pay him 26,000 francs for enforcing a plain, clear forfeiture of a lease of all of the property left her by her husband that gave her any income worth mentioning, wherewith to provide for her children; where success was certain, the remedy easy, and the suit required the possession of no learning, the exercise of no ability, the expenditure of little time and less labor; and that she also with his consent, if not at his instance, employed other counsel to aid him, and agreed to pay 5,200 francs in addition.

For if such a bargain were alleged by one's enemy to have been made by him, his friends would refuse to give

credit to the charge; and if the tribunals should decide in favor of those who allege it here, an unpleasant doubt, to say the least, would haunt many bosoms that the woman, nevertheless, had not sworn falsely, while those who knew her well and loved and honored her for the nobleness and generosity of her nature would implicitly believe that she had spoken the entire truth. It must seem unbecoming and of grave impropriety to sustain by their own oaths alone, so questionable a claim.

There was but one question in the case, as to which the amount of the promised fee could be material; but a single issue, in trying which it could be inquired whether Mrs. Cox promised to pay $2,500, as she alleges, or $5,000, as her antagonist claims and he and his partner testify. The bill stated, as a ground for his removal, because evidence of an interest and claim incompatible with his continuance as trustee, that friendly relations did not exist between them, in consequence of *what she regarded* as unjust, unrighteous, and exorbitant demands made against her in bad faith, by him, for himself and his partner, which she refused to recognize.

If he could prove that the demands were just, righteous, and reasonable, that would not prove that her averment was not true, that she regarded them as neither one nor the other, that she had refused to recognize them, and that enmity between them was the consequence.

In reply, he swore that she had promised to pay $5,000. That was no answer to her allegation. A demand may be none the less unjust, unrighteous, and exorbitant, because one has promised to pay it. A promise to pay such a demand is one that may be avoided; because it is a fraud to accept it. And he does not show, either by answer or testimony, that the claim is just, righteous, and reasonable.

There could be no issue as to the amount of the fee, except that. An issue is formed, that some judgment may be the result of its determination. The only judgment that could follow the issue made upon the statement in the bill

was either that he ought to be or not to be removed. To *find* the amount of the fee, upon or without an issue as to its amount, would be useless, unless there could be judgment for some amount or other, *binding both Carlisle and McPherson.*

There could be no such judgment, for half a dozen reasons:

None was asked for by him.

None could be, because it must be in favor of Mr. Carlisle and himself, and the former is no party to the suit.

There was no issue in regard to the amount of the fee. The bill specified no fee. It spoke of *demands*, generally. The answer stated a contract by parol to pay $5,000; but it was not made a cross-bill, nor was she called on to answer as to this claim.

We did not see fit to let the statement go uncontradicted, because it had been improperly lugged into the bill and care taken to give the complainant no chance to answer in regard to it. And, having to file a supplemental bill for other matter, we stated in it what he claimed, and that he had taken his partner's testimony, and had not sued nor impleaded her, nor given her opportunity to answer; and, reiterating the allegation of the bill, that they claimed of her an exorbitant fee, she alleged that she never offered to pay any other sum than $2,500. As to the queer argument in the answer in regard to this, it needs no reply.

Without any issue as to the matter of the fee, as to which, if it was to be brought into the case, she had a right to reply on oath, and her answer would be testimony; *purposely* refraining from offering an issue and giving her an opportunity to deny what he alleged, he proceeded irregularly to take his partner's testimony, compelling her, if she would deny what he alleged, to do it by amendment or supplemental bill. She did so, saying, in substance, "he has alleged this, given me no opportunity to answer it, asked no relief in regard to it, and has taken his partner's testimony. If it were true, still the fee *is* exorbitant; I promised to pay

only $2,500, and that is exorbitant, and I will appeal to the Court to protect me against extortion."

The defendant proved, then, and has been sedulously proving, all the time, the truth of what she alleged as reasons for his removal. He *did*, on or about March, 1873, forbid the payment to her, by Ford, of *any* thing, principal or interest, on her bond, and he "reminded him" of this afterwards. Afterwards, before the suit was instituted, he says, he countermanded this order. "I did it," he says, "by request of Mr. Ford, to go on and pay his interest. I think that was the form of it. I did not make it in the formal terms used in the question. My object was simply to release him from the prohibition." That is, a little more briefly, what he says. "He told me I had better pay her;" Ford says. Well, he did *not* pay her, *had* not paid her when the suit was brought; *and she had no information that the cruel order had been recalled.* Mr. McPherson did not trouble himself to make it known to her.

He did not see to it that the interest should be punctually paid. He prevented it. He says the deed imposed no such duty on him. He did not see to it that the taxes should be paid, or that the buildings should be kept insured; though the deed, which he drew, required that the policies should be assigned to him and Wilson, as trustees.

It was not his duty? The deed did not require it? We may well suppose that when he made himself trustee, this widow *expected* him to take some *little* care of her interests; and *we* think that some duties *did* devolve upon him. He "felt a very warm interest in her business," and she consulted him continually. But, whatever his *duty* was, he claims for himself and partner a lien on the bond and land for $5,000, and if he has it, he had five thirty-eighths and she the residue of the whole *interest* in having the taxes paid and the property insured; and he was not by any means "a dry trustee." She might *find* a person who *would* consider it a duty to see to her interests, even if he did not expect to

sell and earn commissions; one who would have some other motive to act as trustee than that which constrains Mr. McPherson to determine to continue to be trustee. "I have thus far performed my duty as trustee," he says; and yet denies that he has had any duty to perform. "I accepted the trust, and have had some trouble, *and if any commissions are to be had therefrom, I desire to earn and receive them.*" He has since "*earned*" half-commissions, two-and-a-half per cent. on *her* notes as well as Kendall's and others', by advertising the property for sale, and doing no more. That is called *earning* money now. And he has compelled her to pay them.

Friendly relations do *not* exist between them; and the principal cause *is* an exorbitant demand, or what she regards as such. And his object in wishing against her will to continue to be her trustee is, *without giving her an opportunity to contest their claim*, avoiding a *litis contestationem* in regard to it, to apply the proceeds of any sale that he may make to the payment of the exorbitant fee that he claims. His denial of that purpose and intention can gain no credit; for he claims a lien on the bond, and a right to hold it as a security for the fee; and that *is* a claim of a right and purpose to *retain* so much of the moneys as will satisfy the lien.

This claim of a lien is disproved by himself. After broad assertion of a lien, to Ford and in his answers, he testifies that, on one occasion, (he does not know whether *before* or *after* he received the bond,) Mrs. Cox asked him if he thought she would take *any* of her papers away from his office without his knowledge? said she would not think of taking them without his consent; and added something that he does not remember, acknowledging that she had no right to take them. Then he says that he always *felt satisfied* that she acknowledged their interest in the papers that secured the proceeds; and that he took the bond with a *belief* that he had a right to hold it as security for the fee. And then he admits that no idea of a lien occurred to her.

There could be no better illustration of the miserable effects of the innovation in the law that makes parties competent witnesses in their own behalf, than this and other testimony of Mr. McPherson in this case. This is to plead, and to argue one's case in testifying; and a lawyer is perhaps the least reliable of witnesses, *in his own case*, because he cannot *help* pleading and arguing in testifying.

There was no sort of agreement, then, that he should have a lien on the bond; and he could have none by effect of law, because it did not come into his possession in the suit in which the fee is claimed, but long afterwards; and because it was not received by him in his character of attorney or solicitor, but in his new character of trustee.

Moreover, he has offered her no issue as to a lien; he has not made himself by any proper pleading, *actor*, and her, *reus*, by demand for a decree recognizing the lien, or by calling on her to answer in regard to it; and there *could* be no such issue, pleading, or decree, because, to any suit to establish a lien, his partner is a necessary party.

And, again, neither he alone nor he and his partner have a lien, nor can have, on the bond, for two reasons, either of them fatal, upon principles that all the world familiarly knows:

1st. He did not receive the bond in his character of her counsel, solicitor, or attorney; but in his new and different character of trustee. It never came into the possession of Carlisle & McPherson, counsellors and solicitors; but into the hands of Mr. McPherson as trustee. It was not received in the course of the business for which the fee is demanded; that business was ended and closed long before the bond was made; and such a lien as he claims is not the creature of a *contract*, but the creature of the *law*.

An attorney has a lien on all papers and deeds which come to his hands *in the course of his professional employment* for the party; but it is for him to show that the papers on which he claims a lien did *so* come to his hands.

Per Gifford, arg. in Stevenson v. Blakelock, 1 M. & S., 538.

It is immaterial as to the question of lien, for what purpose an attorney receives the papers of his client, *provided he receives them in the ordinary course of his business.*

Per Littledale, arg. in same case.

Per Lord Ellenborough: Where there is an express antecedent contract between the parties, a lien which grows out of an implied contract does not arise. But in the absence of any express contract there may be a lien, and a right of action on an implied contract.

Same case.

And the Court assented to the doctrine, that the papers must have come into the defendant's possession *as attorney, in the ordinary course of business, and not as a mere bailee.*

A solicitor has no lien on papers which come into his possession, not in the character of solicitor, but of steward.

Champernown v. Scott, 6 Madd., 93.

If the papers came into his hands *in the character of attorney or solicitor*, for the purpose of business, though they did not come into his hands for the particular cause in which he makes the demand of costs, he has a lien. It depends on the practice.

Ex-parte Nesbitt, 2 Sch. & Lef., 279.

The lien of a solicitor on the deeds and papers of his client is merely a right to withhold the papers from his client, *and not a right to enforce any claim against him.*

Blunden v. Desart, 2 Coun. & L., 119.

Bozon v. Bolland, 4 Mylne & Cr., 358.

So long as the client allows the papers to remain in the solicitor's hands, the lien is unavailing.

Bozon v. Bolland, 4 Myl. & Cr., 358.

So that even if Mr. McPherson has a lien on the land and a right to retain it, it would give him no lien on the money due by it, and no right to enforce the claim of Carlisle & McPherson for the fee claimed, against Mrs. Cox or the fund. Therefore his order not to pay, given to Ford, was inexcusable.

The lien of a solicitor does not depend on *contract*, but on *the law*,

Blunden v. Desart, 2 Conn. & L., 130,

and therefore the attempt to prove that Mrs. Cox agreed that Mr. McPherson had a right to hold the land, and conceded that he had a lien on it, is mere idle gossip.

2d. According to his answer and testimony, the "contingent!" fee was not to be paid presently, nor at any fixed time, but out of the proceeds of the land, when she should sell it again and realize the price. She sold it for $38,000, on which she has received the annually-accruing interest, *in part*. She sold it for that sum, payable at the end of ten years, a period yet remote. In part payment she has, *by his advice* and with his consent, taken for $13,000 eleven notes of a third person, payable at three, four, five, and six years; and of the principal, $2,000 only; of this she paid *him*, immediately, $1,000, in part payment of a loan, and it has cost her $1,322.65 to buy up another note held by Kendall. Two others, equally charged on the lots sold to Pike, and overdue, either Westervelt holds, *or she has had to buy them also.*

The contract is utterly inconsistent with the existence of a lien.

It has been held in some cases, that where there was a special agreement, the right of lien could not exist. But, to produce that negatory effect, the special agreement must contain some terms inconsistent with the continuance of the lien. Sometimes, where bills of lading are given, there is a stipulation that the freight shall be paid *at a certain time* after arrival; that is wholly inconsistent with the continuance of the lien, and destroys it. While bills are still running, and while they are pending, they supersede the lien. A right to detain for the future event of bills, is inconsistent with the lien.

Per Lens, Serjeant, arg. in Hutton v. Bragg, 7 Taunt., 21.

If an innkeeper makes a special contract with his guest

for payment, which is inconsistent with the detainer of a chattel for the existence of a lien, or which shows that he relies exclusively on the personal credit of his guest, as if he stipulates for payment at a future day, or in a particular mode, the lien is extinguished.

The case of an Hostler, Yelv., 67, *note*, where the authorities are largely discussed.

In Cowell vs. Simpson, 16 Ves., 275, the Lord Chancellor said: "If the lien commenced under an implied contract, and afterwards a special contract is made for payment, in the nature of the thing the one contract destroys the other."

The right of an attorney to detain papers for his general balance being, like other liens, a right which arises by implication of law, the moment a special agreement is entered into, that right ceases.

And this principle of law applies with peculiar cogency in this case, because, in the changed relations of the parties, and in view of McPherson's claims, the possession of the bond by her is essential to enable her to collect the interest as it accrues, which is almost her only means of living. Neither he nor his partner were very willing to admit that. Mr. Carlisle "had no accurate knowledge of her pecuniary condition." So far as he knew she lived within her means, but occasionally had to ask him for loans. Mr. McPherson says that she and her children own square 311, adjoining the other, besides other property in that vicinity, and also very valuable, "and yields *some* income." But he also knew that, while "resisting every temptation, she devoted herself to the management and preservation of her property," and "exhibited a wonderful self-denial and steadfastness of purpose," she had to borrow of him also,—*he* says, upwards of $1,800 in money; *she* says, $1,000 and $140, besides what he retained for advances made, when the rents were collected from Angus and Lewis, and out of $1,252.05 *she* received $334.16.

Therefore both must have known *how much* other means

of living she had; and that without the accruing interest she must be greatly distressed.

Her debtor, Ford, would have had no pretext to obey Mr. McPherson's order to pay her nothing more, if she had had the bond. The possession of it enables Mr. McPherson at any time to distress her, because, naturally, when Ford pays an installment of interest, he wants it credited on the bond; and, Mr. McPherson says, "it is not *my* business to see that the interest is paid."

By the French law, it is not permissible to prove an agreement to pay more than a very limited amount, without at least *commencement* of proof in writing; and the provision is a wise one. A long experience convinces us of the impolicy and mischievous consequences of permitting contracts for large sums to be proven by oral testimony only, even of witnesses *supposed* to be impartial; and the mischief is enormously increased when it is permitted to be done by the oaths of the demandants themselves. This case is a strong illustration of the miserable policy of the law. Above all other men, lawyers ought to have contracts with them evidenced by writing. It *costs* them nothing to prepare a contract; and a party who makes one orally with an attorney, for a fee, will make it in writing, if requested; or, if he will not, the lawyer should refuse to rely on a verbal contract. For every lawyer knows that a very large portion of ordinary litigation is caused by neglect to reduce agreements to writing. Memories are defective, especially when to have a good one costs; and the temptation to forget onerous bargains is very strong. In this case there is unquestionably false swearing or wretched memory on more than one point, on one side or the other. We do not even know how far Mr. McPherson's incompetent testimony as to the record and proceedings of the ejectment and equity suits are correct and fair or merely partial and deceptive.

He should have produced the record, to *prove* that he *had* reason to doubt and think success uncertain and the fee actually contingent.

We do not say what the record in reality shows. The counsel on the other side must not say what it says or does not say. There is no competent proof in the case that there ever was any suit at all, except that for rents. We objected to oral testimony of what ought to be proved by the record, and we insist on the objection now.

Messrs. Carlisle & McPherson could without difficulty have had a written agreement signed by Mrs. Cox. Their failure to do so is not her fault; and they ought to suffer for their neglect. A solicitor ought never to run the risk of a collision of oaths between himself and a client; and in every such case as this a Chancellor ought to say, in the language of Lord Hardwicke, "Can it be thought that this Court will suffer a gentleman of the bar to maintain an action" on an alleged oral bargain to pay him a large fee in case of success, out of the proceeds of the property, especially when the client denies it on oath, and he has no other way to prove it than by his own oath?

But the appellant and his counsel think that it is perfectly fit that he should continue to be trustee. We easily convince ourselves of that which it is for our interest to believe, and self-deception is common to all of us; although Juvenal says,

> Exemplo quodcunque malo committitur, ipsi
> Displicet auctori;

and

> Se judice nemo nocens absolvitur.

"I think I am quite a fit person to be trustee," the lawyer says; "she admits that she owes me *some*thing. She owed it when she chose me for trustee. Surely I am as fit now as I was then."

By no manner of means. Then, you had not claimed a fee, which she denied owing. You had not then claimed to have a lien on the bond given to her. You were friends;

you had great regard and sympathy for her. Now, you swear that she promised to pay you $5,000, and she swears that this is absolutely false. You claim a lien, which she denies your right to. You are enemies now. You have lost your sympathy and regard for her; you have sworn that she is faithless and a habitual liar (that is what *untruthfulness* means); and she feels towards you as it is natural she should. You are remarkably *un*fit to be her trustee.

Seeing how all things tend to depravation in the struggle for wealth as the one thing worth striving for, we cannot know what may come by and by, where there is already so much change; but a solicitor cannot *as yet* become trustee for a client, and represent himself and her at the same time, where their interests are antagonistic. A trust is a *fidei-commissum*, or somewhat entrusted to the good faith, integrity, and honor of a man. And the trustee who sets his own interest and profit in opposition to those of one for whom he is trustee, is unfit to be trustee—for, in fact, so far as he looks to his own interest, he is not performing his trust but violating it, and falsely calls himself trustee.

Technically, he cannot have the fee, and at the same time a lien on the fee. In principle and right he cannot hold the fee as trustee, and have a lien on it in his own favor; for, if he sues to establish it, will he, as trustee, faithfully defend against his own suit, for his cestui que trust?

He desires but to wear the mask of a trust, in order to profit by it at the cost of his beneficiary.

If he *has* a lien, he can sell under it, and buy in the property. But this is forbidden to a trustee: nor can he buy a debt in, and sell the property for it.

Van Horne v. Fonda, 5 J. C. R., 409.

He who is entrusted with the business of others cannot be allowed to make the business an object to himself. . . He will be too readily seized with an inclination to serve his own interests, at the expense of those for whom he is entrusted.

Davoue v. Fanning, 2 J. C. R., 270.

Conflict of interests is the rock for shunning which the trustee's disability to buy for himself when he sells as trustee, has obtained its force.—(*Id.*)

There never was a case in which the conflict of interests was greater than it is here. The trustee, by his own answer, claims to hold a lien for himself and partner, to be satisfied out of the trust fund, and admits that the cestui que trust denies its justice.

The defendant has confessedly an interest adverse to that of his *cestui que trust.* His *duty* as trustee, is at war with his inclination and interest. These have come in collision with it, and it has gone to the wall.

A trustee's interest must not interfere with his duty. He must have no mercenary views. And he can use his powers only for the legitimate purposes of the trust.

Willard, 187, 8, 184, 472.

He cannot use the advantage that the trust gives him, to coerce her to an undue accommodation.

Green v. Winter, 1 J. C. R., 41.

Those who have a duty to perform for others, should not, in the discharge of that very duty, deal for themselves.

Howell v. Baker, 4 J. C. R., 120.

The general rule is, that every act of the trustee must tend to the benefit of the *cestui que trust.*

Willis on Trustees, 126.

He takes the trust for no advantage to himself. If a trust is imposed, he cannot take beneficially.

Willis, 121, 162.

Hill on Trustees, 535.

The temptation to take unfair advantages would be too great, if this were permitted.

He cannot be both seller and buyer, for he cannot be himself and another at the same time.

It is one of the settled principles of Courts of Equity, that trustees shall not take advantage of their situation to ob-

tain personal benefit to themselves at the expense of their cestuis que trust.

Hill on Trustees, 535.

"Where a trustee is merely a trustee, and there is any act to be done by him, it is very commendable in him to be cautious, but where he has a private interest of his own separate and independent from the trust, and obliges *cestui que trust* to come into this Court, merely to have the point relating to his private interest determined at the expense of the trust; this is such a vexatious behaviour in him, that for example's sake he will be decreed to pay the whole costs of the suit."

Henley v. Phillips, 2 Atk., 48, per Lord Hardwicke.

And we think that there have been very few cases in which it has been so glaringly improper for a trustee to continue to be such, as this is. The reason given for his desire to do so is not one entitled to great favor. While he desires to receive moneys as trustee, in order to appropriate a large part of it to himself and partner, against the will and the protest of his cestui que trust, in satisfaction of a claim for a great fee which she swears she never agreed to give, he also would like to make his commissions as trustee, for selling the property, *in part for his own benefit*, as pledgee of the bond.

And the proof, against her oath, that she agreed to pay more than $2,500, is the testimony of the lawyers claiming the enormous fee.

It is a general rule in equity that a trustee shall not be permitted to raise in himself an interest opposite to that of his cestui que trust; and it is on *this* ground that he cannot be purchaser.

Willis, 163.

Van Horne v. Fonda, 5 Johns. Ch. R., 409.

If their fee was to be secured, why not have said so? She denies owing it, denies that she ever agreed or offered to pay more than $2,500. If they *had* been offered $5,000, why did they not have a lien for it stipulated in the deed?

We might argue that the defendant *became* trustee in order to gain an unfair advantage, by collecting an exorbitant fee for himself and his partner, without warning to her even by a demand, and giving her no opportunity to contest it. That is what he proposes to do now. He avers it to be his purpose; and it would not be uncharitable to aver that it was his purpose at first. If that is inferred, whom but himself can he blame for that natural consequence of his acts?

He proposes to have *execution* without judgment or suit: without sentence, conviction or trial: to take the money as trustee, and put it into his pocket and his partner's, and let *her* sue *them* for it.

Thus he proposes to use his trusteeship for hostile personal purposes. That is not permissible under any code of laws. It is not fair, right, or fit to be done or allowed.

Why do they not *sue* her for the fee? It is a *legal* claim. If they have a lien, why not file a bill to establish and enforce it?

All she says is, that they *claim* an exorbitant fee from her. That is the only issuable allegation about the fee. She does not ask any decision or any answer from the defendant, as to the amount claimed or the justice of the claim, her agreement or the value of their services. She simply says, they *claim* a fee.

Well,—the defendant *admits* that they *do* claim the fee, and *shows* that it *is* exorbitant. It shocks the moral sense. Is it too much to say that it is an attempt at extortion?

He claims to be trustee for Mrs. Cox and for Carlisle & McPherson jointly;—for them, for $5,000; for her, for the residue of what is due her. Is he trustee for Walter S. Cox for another $1,000? Why not?

If the claim is well founded, he will sell as trustee for them as well as for her. Does he claim that they are to be *first* paid? If not, why did he order Ford not to pay her *any part* of the principal?

How was he made trustee for Carlisle & McPherson; so

becoming both trustee and *cestui que trust?* The deed does not mention their claim. Carlisle is no party to it, nor named in it.

It is a widow, too, with little other means of living than those that are entrusted to this defendant, of whom he demands this fee, and whom he seeks unfairly to coerce to pay it. A widow, old and poor—one of God's wards, the old saints said. Nunc viduam extrudi turpe'st: it is said in the Phormio of Terence. The laws of chivalry bound every knight "to defend the Church, widows and orphans, and to undertake their cause when necessity required, saving always their own honour." They were required "to search out widows and helpless orphans in their necessity;" and they were equally bound by their vows "to refuse unreasonable rewards."

The plaintiff is a widow; left with her little means with orphans to support. The defendant professes to have been her friend. Now he taunts her with her obligations for loans to himself and his partner, and has his partner to testify to the loans he made: and *printing* an answer that brands her as ungrateful and untruthful, seeks to exact unreasonable reward for service, and to take from her a sum that, to be exacted from one of her means and needs, is enormous.

It is a wise provision of the Statute of Frauds, that such bargains cannot be proved by parol, if they are not to be performed within a year.

Mrs Cox has stated on oath that the services rendered were not *worth* more than $500. *That* is not disproved. If it *could be*, the record would be the instrument of disproval. Why has not the appellant disproved it by the record?

He says that she admits that she owes something. Undoubtedly she owes *some*thing: but if she does, that does not make him fit to be trustee, while he claims that she owes largely more. But, he says, whatever she owes, if she owes anything, I have a right to retain. But that does not obviate a single reason why he has *no* right to retain.

She admits that she offered and promised $2,500; and she *was* willing to pay that. She said so, but the trustee and his partner did not choose to accept her offer to pay that when she should be able to do it out of the proceeds of sale; and now she says, having learned that she has a right to do so, and *ought to do so*, that she declines to pay it because it is an exorbitant fee, and there was no doubt or contingency in the case.

When any Court shall have, by means of a proper suit or proceeding duly instituted by Messrs. Carlisle and McPherson, jurisdiction to determine how much this widow shall pay them, we will be ready to discuss that question with reference to these circumstances. Apart from all other questions, nothing can be allowed for the services of Mr. Carlisle, who rendered none, and for *whose* services especially, the plaintiff offered to pay a fee of twenty-five hundred dollars.

The general tone of the answer to the original bill is not such as should commend the case of the trustee to the favorable consideration of the Court. One should not desire to be trustee for a woman, to receive moneys for her, whom he stigmatizes as untruthful. There is too much in the answer that has no business there; and much in it is not well said.

For example, what is said of the loans made to the plaintiff. That is no part of the *answer*. The paper is an *answer*, only so far as it responds to the allegations of the bill, either by admitting, denying, explaining, or confessing and avoiding.

The answer is not frank and fair; it cavils, and therefore is entitled to no credit as *testimony*. It denies that the plaintiff had an estate in fee in the land; and yet the defendant is trustee by a conveyance in fee, and if he sells, must convey in fee, or defraud the purchaser. The denials of the answer in regard to advice given the plaintiff by the defendant are too broad, as his letters that are in evidence show. And he does not answer without evasion in regard to her circumstances.

In fact, the answer is liable to serious objection throughout; and its tone and spirit as well as some of its statements, are enough, of themselves, to show that the defendant ought neither to desire nor be permitted to continue to be trustee.

It is certainly no good reason that he should be, that he has had *some* trouble (what trouble? and when?) and if anything is to be made, he wants it.

> "Quis enim virtutem complectitur ipsam,
> Præmia si tollas?"

But it suggests this, that, as trustee, he has no duties to perform, is under no responsibility, but holds the mere naked legal interest with a power to sell; that this bears the same relation to a mortgage made to Mrs. Cox, that a conveyance to him of the fee, to her use, would bear to a conveyance directly to herself. That would be an executed use, and in equity a conveyance to herself. The deed of trust here is, in equity, a mortgage to her, and he is but one of her agents to sell, a mere instrument, with no other powers than to sell and convey to the purchaser, and with no discretion. He has a power not coupled with an interest; and so has Wilson; and the Court would, at her desire, and without any reference to their wishes, decree that their mere formal title should vest in her. That they would like to make the sale, in order to have the commission, a remuneration utterly out of proportion to the service to be performed, would rather induce the Court to compel them to convey to her, than prevent it; and if she were to buy in the equity of redemption of Ford and Holden, either under execution or a judgment at law on their bond, or by private arrangement, she would own the whole fee in equity notwithstanding the formal legal title in her trustees.

If this is the law, as it clearly is, the defendant has not the faintest shadow of a right to have the legal title continued in himself and Wilson. Mrs. Cox has a perfect right to demand that it shall be vested in her, and did not need

to give any other reason for it than that she wished to have it so, in order that she might be free to deal as she might desire with what is, in equity, wholly her own. The debtors do not object. Why should they? The decree will not affect *them*. If they did object, what would it matter? They were made parties, not because they needed to be, but because the defendant, eager to avail himself of anything that would be likely to hinder prompt attention by the Court, by demurrer demanded that they and his co-trustee should be made defendants. He was nervously solicitous as to the ill consequences to others if he were removed without their concurrence. Or, did he count on their opposition? And if they *had* opposed it, what respect would the Court have paid to an opposition that would only the more cogently have proven the propriety of removing him? We made them parties simply to save time and discussion.

He claims to be a *dry* trustee, with no duties to perform. Like the town-pump, he is to be inert, inactive, exanimate, a mere upright hollow log, until some one stirs him to action by movement of the handle. He may or may not have something to do. Meanwhile, he is merely ornamental.

But he is also disqualified by his interest adverse to hers, to be her trustee and receive her money. It is not fit he should be so. It was not fit he should have made himself so at first. The position in which he stands is not one that he ought to wish to occupy.

And, when it is added that he has acted against her interest, prevented her debtor from paying her the just interest on the debt, when she has little except what that debtor owes her to look to, as the means whereby not to starve or beg, the impropriety, unbecomingness, and injustice of his withholding from her the legal title of mortgagee, and her bond, are too apparent to need further argument. He cannot be permitted to be her procurator and her antagonist, and procurator for her and *in rem suam*, at one and the same time; for that is to be, at one and the same time, two distinct and hostile persons in law.

The counsel for the appellant, upon the appeal to the Supreme Court of the District, set forth in his printed brief these propositions, among others:

"The estate created by the limitation of the deed is a joint estate for the lives of the grantees, with a contingent remainder in fee to the survivor.—(Barton's Conveyancing, page 152.)"

And he gravely inquired:

"How can this contingent remainder be destroyed unless the interest of both grantees be subjected to the operation of the decree."

It was a question for Captain Bunsby. The counsel was in a Court of *Equity*, engaged in a suit in equity. Why wander into the misty realm of contingent remainders and evoke the ghost of Fearne to rise and answer?

Mortgages containing powers of sale, and deeds of trust to secure a debt due to a creditor, are substantially the same thing, in law and equity.

Perry, 602, *d*.

It is immaterial that the conveyance is made to a third person, and not to the creditor himself.—(Ib.)

Payment in full to Mrs. Cox would disturb the contingent remainders, mightily; so would a purchase by her of Ford's equity of redemption.

"A trustee in a deed of trust for security is subject to the same rules that govern all trustees." Rather a self-evident proposition! As *all* trustees have among them those "for security;" and the whole includes all its parts, and the greater the less, rules that govern *all* trustees must necessarily govern any *one* trustee.

"If a trustee once accepts the trust, or does any act, he cannot abandon it without the consent of all parties in interest, or the decree of the Court. He cannot resign even with the consent of all parties, so as to transfer his rights or powers, title or interest, as trustee, to others, or to co-trustees, unless the deed of trust makes special provisions therefor, without the decree of a Court of Equity."

Therefore, he says, Mr. McPherson thought it idle to make any reply to the letter of Mrs. Cox, asking him to resign, and threatening to bring suit for the appointment of a trustee in his stead.

But he could have replied to the letter, and stated what he understood the law to be, and expresed his willingness that, upon a petition by her, there should be such a decree as he deemed necessary. Or he could have filed a petition, himself, stating that he felt it inconsistent with his office of trustee to claim a lien on the bond, for the fee of $5,000, and expressing a desire to be freed of the trust, so as to be at liberty, without impropriety, to assert, with Mr. Carlisle, his rights as a creditor. It is always easy enough to do what is right, in the right way, if one is truly desirous to do so.

But Mr. McPherson did *not* desire to resign. He has said he does not, under oath. He has said that he has had *some* trouble, and that if there is any thing to be made in the way of commissions, he wishes to earn and receive it.

There is nothing in the proposition, in effect, that requires any reply. It is quoted correctly from Perry, and is applicable to cases of *active* trusts, where the trustee is invested with the charge and management of a fund or of lands. The authorities quoted as sustaining it, should explain it. Perhaps they do.

The cases cited in support of the proposition which we have quoted, are four in number:

1st. *Drane* v. *Gunter*, 19 *Ala.*, 731. In this case it was held that a trustee *to manage property* can only resign *by permission of a Court of Chancery*, and will be required to render a full account. He cannot resign at his pleasure, to a Court of Equity.

In that case, no case for removal was made, nor was the bill filed with a view of removing the trustee, and he resisted it.

2d. Auger v. Halliday, 11 Paige, 319. This was a case of *active* trusts. And it was held that such a trustee must be

discharged by virtue of a special provision of the deed or will creating the trust, *or* by order or decree of a Court of Chancery, *or with the general consent of all parties interested in the execution of the trusts.* And the Chancellor says that it was doubtful, in that case, whether the latter would suffice, there being infants interested, and others not in existence, or not in a situation to consent.

Mr. McPherson desired that Holden, King, and Ford should be made parties. They were not necessary parties; but as the easiest mode of brushing away a frivolous demurrer, we made them parties, and they consented to the change of trustee. And now, in the argument, the counsel object to the decree because Wilson, the co-trustee, is not a party. The demurrer was for non-joinder of him also; but to join him would have been entirely too preposterous; and we paid no attention to that part of the demurrer, nor did the Court below.

A party against whom you want no relief, and can take no decree, of whom you want no discovery, and whose consent to the decree you seek is not necessary, is not a necessary party. If Wilson *had* been made a party, and had objected to the change, would the Court have paid any attention to his objection? And "the estate created by the limitations of the deed is a joint estate for the lives of the grantees, with a contingent remainder in fee to the survivor," is it? And "how *can* this contingent remainder be destroyed unless the interest of both grantees be subjected to the operation of the decree?" The question should be submitted to Captain Cuttle's friend, for "an opinion as *is* an *opinion*."

3d. *Sergeant vs. Howe*, 21 *Illinois*, 148. The decision in this case is: If a trustee to sell for a debt combines to defraud the assignee of it, he should be removed and a proper person appointed to execute the trust. Under the general prayer for relief, the Court might remove him, if the proof on the hearing should require it. *There is nothing in the case about resigning.*

4th. *Breedlove vs. Stump*, 3 Yerger, 257. In this case it is decided that when trustees accept a trust, and enter on its execution, they cannot be discharged of it *without the consent of the cestui que trust*, or the direction of a Court of Equity. This is quoted from 4 Johns. Ch. R., 138, which was a case of a trust by assignment for the benefit of creditors.

In the case in Yerger there was a simple deposit of a note, in trust to indemnify another, who was indorser.

The Court also held that a waiver of the relief prayed against a person answers an objection taken for failure to make him a party. The counsel must have winked hard not to see that this did not *sustain* his objection as to the non-joinder of Wilson.

The *cestui que trust* assents, here—does considerably more than assent.

The next proposition is, that the bill made charges of fraud and negligence against the defendant; and "if such allegations were unsupported by proof, the bill should have been dismissed, notwithstanding the fact that the Court might have decreed the relief sought, if a bill without such allegations had been filed."

That is, if one files a bill, charging *more than is necessary* to give him a right to the relief asked, he shall not have it, though he proves enough to entitle him to it, if he does not prove the surplus. *Supervacuum nocet* would be a new maxim. Quintilian says: *Non tam obest audire supervacua quàm ignorare necessaria;* and it is quite as true that *non tam obest dicere supervacua, quàm necessaria non probare.*

The case quoted as sustaining this is *Eyre v. Potter*, 15 *Howard*, 56. There it was held that if the bill sets up a case of *actual* fraud, and makes that the ground of the prayer for relief, the plaintiff is not entitled to a decree by proving *some* of the facts *quite independent of fraud*, but which might

of themselves create a case *under a totally different head of equity* from that which would be applicable to the case of fraud originally stated.

The Court cited Price v. Berrington, 7 Eng. Law & Eq., 254, where a conveyance was sought to be set aside on the ground of fraud, consisting in insufficient consideration, suppression, and coercion, the vendee being insane; and the lunacy alone was proven.

That a case cited is sound law, is no excuse for citing it, if it does not apply. The bill in this case asked the removal of McPherson on the ground of unfriendly relations, caused chiefly by what the complainant regarded as an exorbitant claim; of the order to Ford not to pay her anything, and of failure to see the interest and taxes paid. The whole was *admitted* by the defendant. But he revoked the order, he said; the fee is not exorbitant, but he does claim it, and a lien on the bond, *and a right to give the order;* and as to the interest and taxes, it was not required by the deed that he should see them paid. How the case cited applies to such a case as this, Argus could not see, with all his hundred eyes.

In Passingham v. Sherborn, 9 Beavan, 424, there was in the bill, as counsel stated, in a question as to the costs, "a string of charges of the grossest fraud and design on the part of the trustees, which have all failed." Yet a trustee was removed, "because the union of these two characters of trustee and lessee had been such, as to create an impediment in the due performance of the duty of the trustees towards the estate." And Lord Langdale, M. R., said "I still think it is not right to permit trustees to remain in a situation, in which their interests must necessarily conflict with their duty, and that it was fit for them, under such circumstances, to retire, yet I think that the difficulty did not arise from any misconduct of theirs, but that they were led into it by the testator himself."

As the proposition of the learned counsel is directly in the teeth of this decision, he will probably think it in con-

flict with that in Eyre v. Potter. When he discovers that both are correct, and the difference or distinction that shows them not in conflict, he will understand why his proposition is not warranted by Eyre v. Potter.

The next proposition is, in brief, a quotation from the same case, to the effect that an answer is proof. Yes, so far as it is responsive to the bill. The bill does not interrogate the defendant as to the amount of the fee or the contract in regard to it; and if the contract *were* proven, that would not make the fee not exorbitant. So much the worse for the lawyer, when he *does* make such a contract. That he revoked the order is not responsive; and whether a particular act was imposed on him as a duty, is to be settled by the deed. Who is to see that the interest is paid, but he who holds the bond? Who else to compel payment of the taxes, but he in whom the title is vested?

"Courts will not substitute trustees upon the mere *caprice* of the *cestui que trust*, and without a reasonable cause, and although the instrument of trust or a statute gives the *cestui que trust* full power to remove and appoint other trustees."

The proposition is preceded by this sentence: "In removing and substituting trustees, the Court does not act arbitrarily, but upon certain general principles, and after a full consideration of the case.—Perry on Trusts, § 277."

This is supposed to be a quotation from *In re Tempest*, Law Reports, 1 Chanc. App. Cas., 485. There was no question of *removal* in the case. There was a vacancy among the trustees under a bill disposing of real estates. The persons authorized to fill it could not agree; and the court was called on to do it. And Sir G. J. Turner said: "In making such appointments, the Court acts upon and exercises its discretion; but the discretion is not a mere arbitrary discretion,

but a discretion in the exercise of which the Court is and ought to be guided by some general rules and principles;" which he then stated. They relate *entirely* to appointments; being in substance, as far as we need quote them, that the Court of Chancery always has regard to the wishes of the author of the trust, to be gathered from the instrument of trust; if he has expressed a disapprobation of an individual, the Court would refrain from appointing him; and so the Court will not appoint a new trustee with a view to the interest of *some* of the cestuis que trust; *for the trustee ought to hold an even hand* between the parties, and not favor a particular one.

If there were a vacancy in the trusteeship in this case, would Mr. McPherson, with his claim of fee and lien, be considered by an English Chancellor *exactly* the fit person to be appointed to hold the bond and sell the land?

The proposition stated above is preceded and followed in Perry, by some other words; the passage reads:

Further, the Court has regard *to the nature of the trust*, and to those instrumentalities by which it can best be carried into execution. Accordingly, Courts will not, &c.

And it ends: "to remove and appoint other trustees, yet good cause must be shown, or the Court cannot be put in motion."

Perry on Trusts, § 277.

In support of the proposition, this passage of Perry is cited, *and cases there cited.* Of those cases, we have noticed *In re Tempest*, above; *O'Keefe* v. *Calthorp*, 1 *Athyns*, 18, does not apply: 69 N. C. (North Carolina) is not in the library; and there is no such case in 59 Penn. St. Rep. as is cited, nor any other case that applies. The others *may* explain the rule.

In Pepper v. Tuckey, 2 Jones & La Touche, 95, there was a marriage. Husband and wife desired to invest certain of the trust moneys upon a private security, and one of the trustees, thinking the security not a proper one, declined to make the investment. The wife, having the power by the

settlement to do so, appointed another in his stead. On bill by husband and wife to compel him to assign the fund to the new trustee, the Lord Chancellor, Sugden, refused; saying that the trustee was under no disability, nor unwilling to act in the trust, had but exercised his discretion in refusing to make the investment, had only done his duty, *bonâ fide* refusing because he thought the security not a proper one. If he had the power, he said, he ought not to exercise it, to enable husband and wife to carry their intention into effect. The act, under which the parties petitioned, was not intended, he said, to give a sanction to a trustee to resign his trust (which the trustee refusing was willing to do), rather than do an act which he deems improper.

In Stevenson's Appeal, 68 Penn. St. R., 101, a widow, having several minor children, and about to marry again, conveyed her property to her father and another, for her sole and separate use during her life, and on other trusts. Her husband and she now prayed removal of the acting trustees and a new appointment, without any allegation of misconduct whatever. The petition was denied, the Court saying that it was not to be believed that the law allowing changes of trustees meant to divest trustees selected for their honesty, integrity, and capacity, "at the mere whim of the *cestui que trust*, who never was trusted, but was intended to be protected against himself; or to enable a husband to be sole judge, without appeal, of who shall manage a trust created for the express purpose of preserving the property for the support and maintenance of his wife."

The only case which the learned counsel refer to as sustaining the proposition is one decided by this Court.

Bouldin v. Alexander, 15 *Wallace*, 132. It was a case of church property. The point decided was that the trustees were not removable at the will of the *cestuis*, and without cause shown.

There was no question as to removal of trustees by the Court; and no such language as that of the proposition is to be found in the decision.

"In no case will the Court remove a trustee unless satisfied of the necessity, and the same rules apply to the appointment and removal of trustees under a deed of trust to secure the payment of a debt, that apply to the removal and appointment of trustees in any other case."

For this are cited:

1st. *Perry on Trusts, secs.* 277 *and* 602, m; which are quoted correctly.

2d. *Sergeant v. Howe,* 21 *Illinois,* 148. This we have already noticed. It holds, what no one in his senses denies, that a trustee to sell for a debt will be removed for fraud; and of course it may be said that in this respect the rule is the same as to him as to any other trustee; but it is not said, there nor any one else, that a trustee merely to sell cannot be removed unless a trustee charged with *active* trusts could, in like case. It is not true, and the proposition is a mere quibble.

The removal of a trustee, and the appointment of another person to sell lands conveyed by the deed of trust, is a matter of discretion with the Court; and will not be ordered without good cause.

Ward v. Dutch, 69 N. Car., 279.

Appellate Courts do not review what is done by a lower Court, in the exercise of discretion. The sufficient reason for this is, that the Appellate Court can rarely be as well advised as to the propriety of doing or not doing what it is discretionary with the Court below to do or not to do, as that Court is. And especially in such a case as this, the Chancellor might see and hear much, that should weigh with him in deciding, which the Appellate Court has not seen or heard.

"A power of sale contained in a deed of trust to secure a debt, is a power coupled with an interest [a debt to whom? to a third person?]; and cannot be revoked by any act of the grantor or donor of the power." [What if it is? Does

a change of trustee revoke the power of sale? It only transfers it.] "In other words, the power is annexed to the property, and is an irrevocable part of the security." Yes, irrevocable as to the creditor; but not irrevocable in the sense that it cannot be taken from one person and committed to another. Else a Court could never remove a trustee.

What *is* the use of laying down such propositions, to be read by a Court of the least intelligence?

It purports to be taken from the work of Mr. Perry, § 602, h. But what *is* there said is quite different, and gives no color to what the proposition is intended to convey, without distinctly saying it,—that there is a power coupled with an interest in the defendant, so that he cannot be displaced. For if this is not meant, a quotation from the Pentateuch would have been quite as applicable.

This is what Mr. Perry does say:

It is a universal rule that a power coupled with an interest is irrevocable; and as a power of sale inserted in a mortgage or contained in a deed of trust to a creditor to secure a debt *or to a third person for his benefit*, is a power, coupled with an interest, it cannot be revoked by any act of the grantor or donor of the power. Not even the death or insanity of the grantor or donor will annul the power or suspend its exercise. THE *debt remains, the right or lien on the property remains, and the power is coupled with* THEM.

Perry, 602, *h*.

Clearly, it did not occur to the counsel that in this case there is undoubtedly a *power* coupled with an *interest;* but that it is a "dry," naked power, in his client, coupled with an interest in ours; and that, in equity, by analogy to an executed use, the power, which is vested for her benefit alone, in her *instrument*, her agent without discretion, her hand, as it were, is deemed to be *in her*, a power coupled with an interest.

Undoubtedly, it has been by some process of cogitation that the counsel has convinced himself that this notion of a power coupled with an interest is applicable to his case. He

fancies, perhaps (though it is hardly credible), that his imaginary lien on the bond inserts itself into the mortgage, wriggles itself into it, and having effected a lodgment there and made itself comfortably at home, is an interest in *him* coupled with the power in the deed.

Such a "coupling" is not even respectable concubinage.

Si quæ voles apta nubere nube pari,

which may be paraphased, for this supposed but illicit *corporum conjugatio*, of power and interest in a *dry* trustee—

> If you to power an interest would wed,
> A marriage-worthy interest let it be.

A lien! Risum teneatis, Judices? A lien on papers is a right to retain them in custody,—no more; not a right to *use*, for the purpose of collecting or recovering a debt. And a more empty, baseless, idle assertion of a lien, by law or agreement, was never made in a Court of Justice, than this which is preferred here; and the proof of its utter emptiness and vanity is furnished by the asserter of it, and is plenary.

A dry trustee to sell is entitled to commissions, and has a lien for expenses and outlays of advertising and the like. Has it ever entered into the mind of man to conceive that this gave him a power coupled with an interest?

The *deed* or instrument creating the power must also create the interest. That cannot come and couple itself with the power by accretion, or like a fungoid growth on a tree.

The other authorities cited by the appellant's counsel, under the last-mentioned proposition, are:

1st. *Berry vs. Skinner*, 30 *Maryland*, 572. It was a case of a mortgage, with power of sale to the mortgagee, to pay a debt due to *himself*. Of course it was held that such a power, conferred on the creditor, is a power coupled with an interest.—(Kent's Comm., iv., 147.)

2d. Peter v. Beverly, 10 Peters, 564. This case is directly *against* the proposition that in case of such a trust as this, there is an interest coupled with the power in the trustee.

It holds that there is *not* a power coupled with an interest, in executors, because they may derive a personal benefit from the trust. For a trust will survive, though in no way beneficial to the trustee.

"The trustee is not an *agent*, but an *officer*, constituted by the parties, and vested with the duties of the trust. In the absence of any *mala fides* appertaining to the trust, he will be favorably regarded and treated by the Court."

The authorities cited for this, are:

1st. Gibbs vs. Smith, 2 Richardson, Eq. R., 134. The decision there was: that where *the management of trust property* is committed to the trustee by the instrument creating the trust, the Court will not remove him, without his consent, *merely* because he and the *cestui* disagree as to the management of the property.

The Court said: "To remove a trustee without his consent is an undoubted power of this Court; but it is rarely exercised. As is justly remarked by Lord Hardwicke, 'a trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety; and it is an act of great kindness in any one to accept of it.'" Mr. McPherson desires to be continued as trustee for his *own* benefit alone. He claims to have no care of management, no duty to perform, until he may be called on to sell, which, if the debt is paid, he never can do. He has *no* degree of trouble and anxiety; and his admitted reason for wanting to retain the *office* is, that he will be glad to earn and receive the commissions.

"If there is no *mala fides*, NOTHING WILLFUL in the conduct of the trustee, the Court regards his acts with a favorable eye."

The Court, it said, could not say that the trustee had erred in judgment. The whole management was committed to his discretion. *The cestui had no authority to interfere in the*

management or receive rents; and THEREFORE it was no ground to remove, that they did not agree as to the management.

The notion that a trustee is not agent; but an *officer* (civil or military?), is picked up from the expression of Lord Hardwicke, that a trust is an *office.* Cicero wrote a work *De Officiis;* but it did not treat of offices of state or colonelcies of the militia; and if this trust is *officium,* an office, how is it that it creates no duties; since *officium* means *a duty?*

2d. *Tiffany and Bullard, Law of Trusts and Trustees,* 387, which simply quotes what Lord Hardwicke said.

"And (in the absence of *mala fides*) *will* not be removed; *and ought not to be removed where* ANY *of the cestuis que trust are satisfied with his retention of the office.*"

For "will not be removed," 21 Illinois, 148, is cited, which we have already noticed.

For the rest, Berry vs. Williamson, 11 B. Monroe, 245. When counsel states succinctly and positively, a distinct proposition, it *ought* not to be preposterous on its face; and the case to which he refers as establishing it, cannot with credit to him, wholly fail to establish anything of the kind. It is not permissible to maltreat cases in that way.

What the case cited decides, is simply this: that a trustee appointed by the grantor of the trust should not be displaced *unless* he has violated his trust, *especially* where (*when he has not violated it*), it is demanded by only *a part* of the beneficiaries.

Comment is unnecessary.

"The feelings and unfriendly relations of the complainant toward and with the defendant, constitute no ground for removing him from the office of trustee."

The authorities cited for this, are:

1st. *Foster v. Davies,* 4 *De Gex, Fisher & Jones,* 139. It was a case of trusts of settlement. There was no cessation of friendly intercourse between the parties to the suit.

Davies was not only trustee of Foster, but for any possible children that might be entitled; and, in certain events, for himself as next of kin.

To the Supreme Court of the District, the counsel for Mr. McPherson, in a printed argument said, of the case just mentioned:

Lord Justice Turner, with whom Lord Justice Knight Bruce concurred, in delivering the opinion of the court said: "I certainly cannot agree with the argument at the bar that the mere fact of there being a discussion between *cestui que trust* and trustee, is a sufficient ground for this Court removing that trustee from the trust because the consequences of that would be that *cestui que trust* might at any time raise a quarrel with the trustee, and thereupon come to this Court to discharge the trustee and remove him from the trust upon the ground of the impossibility of their acting together."

We re-print this paragraph exactly. But Lord Justice Turner *did not say* "between CESTUI QUE TRUST and trustee." What he *did* say is, "the mere fact of there being a discussion *between* ONE OF SEVERAL CESTUIS and the trustee."

It is not well to be careless in quoting, when one professes, by quotation-marks, to give the *exact* language, especially when the mistake will make the sentence more or somewhat favorable to himself.

The Court said, that the mere fact of there being a dissension between *one of several* cestuis and the trustee, was not sufficient ground for the Court removing that trustee. . . . "It would be the duty of the Court," the Lord Justice said, "as I conceive, in all cases of that description, to inquire and ascertain from whose fault that dissension or that cessation of friendly intercourse has arisen." And he also said that before the Court discharges a trustee on the ground of his having antagonistic interests, it ought to be satisfied that there is foundation for the claims on which they are raised.

Clearly the Lord Justice did *not* think that dissension between a sole cestui and the trustee, or even between one of

two or more and him, if bitter, and founded on causes not frivolous, and if the fault was in the trustee, was not cause of removal.

2d. *Gibbs v. Smith*, 2 *Richardson*, 134; which we have already noticed, and which does not *at all* sustain the proposition.

3d. *Berry v. Williamson*, 11 *Ben. Monr.*, 245. In this case, land was conveyed in trust, the trustee to lay it off into town-lots, sell, and invest the funds for the three daughters of the grantor.

The trustee would not *convey the lots to the women*, because this would have put the property in the power of their husbands. In this, of course, he was clearly right, and merely doing his duty and obeying the will of the grantor. The Court said, "The immediate beneficiaries have not the right, *at their own mere option*, to change the trustee, nor is their dissatisfaction with the office, nor even with the personal conduct of the trustee, *unless founded in good and sufficient causes*, a proper ground on which the Chancellor should displace the trustee, *and especially when he was selected*, not merely for the benefit of others, *but in part for his own benefit.*"

It is not a very felicitous way of quoting adjudged cases, to omit those portions of what is said by the Court, without which what is quoted cannot be fairly understood, and its sense is in effect perverted.

It must be admitted that the counsel of the appellant entertains, or at least expresses, some singular opinions.

For example, he says:

"The decree erroneously assumes that the defendant invokes the Court's aid to declare a lien on the bond in the proceedings mentioned for the fees due him and his copartner, and to ascertain the amount of this fee. . . . The defendant does nothing of the kind.

"He avers that he claims a lien on the bond, that his copartner claims a lien on the bond, that these facts are shown in the complaint, . . . that he claims the lien as attorney and solicitor. Now what is his position?

"He simply appeals to the Court to protect his lien; how? Not by decreeing a lien, which could not be done without

the filing of a cross-bill; but by refusing to make the decree asked for by complainant, to wit, to deliver up the bond to her. He shows the Court why it should refuse to her such relief. She does not offer to do equity by paying to him the fee which she admits to be due and unpaid."

The counsel does not seem to know that what he wants the Court to do, is precisely to maintain him in the possession of his pretended lien. The lien on papers *is simply a right to retain.* It is precisely that right which he wishes the Court to maintain him in, until she pays the fee that he claims. He must *establish* his lien, to have that decree, and to do that he must establish the debt. That is the first and indispensable thing. The debt gives the right to retain. And he cannot sue *alone* to have it adjudged that the client owes him and Mr. Carlisle, as partners, a fee.

The counsel thinks that he can. "*He* conducted the business in Court for the recovery of the land. His name alone appeared in the record." Not quite. The name of Mr. Cox is joined with his in the equity suit. It is rather more important that the suit for the fee must be on the contract for the fee, which he proves was made with *Carlisle* & McPherson; and if Mr. Carlisle never appeared in the suit, and his name never appeared in it, she is not bound to pay anything for his services, *which she expressly insisted on*, and which were the *sole* consideration that induced her to offer the fee. But Mr. Carlisle's neglect of the business or total failure to be attorney or solicitor in it in Court does not qualify his partner to be sole plaintiff in a suit for the fee. The idea of a *dormant* law-partner is entirely new; and the whole notion of Mr. McPherson suing for and recovering the whole fee, as sole plaintiff, is utter nonsense.

The authorities cited for it are;

1st. Platt v. Haler, 23 Wendell, 456. It was held in this case that an action may be maintained by one of two partners of a law-firm, where the particular business has been *uniformly* done in the name of the partner suing. But set-off was allowed in such suit of a demand against the firm.

The suit, the Court said, is for the benefit of the firm, *and in a name by which it is represented.* The chancery business of the office had been *uniformly* done in the name of Platt as solicitor, the other partner not being known therein in the papers.

2d. *Warren v. Griswold*, 8 *Wendell*, 665. In this case, held that where one attorney of a firm prosecutes a suit in his name alone as the attorney of record, he may maintain an action in the joint names, for recovery of costs of suit against their client. And the Court *was not prepared to say* that one might not sue alone: a dormant partner, it said, *need* not be joined, but may. Yet Sutherland, J., admits that *both* would be responsible to the client for damages for unskillfulness.

It is quite certain that these authorities, not of much worth beyond New York, to establish such a practice, do not even *tend* to establish the proposition, that on a special contract with two lawyers (who are partners) for a contingent fee, one of them can sue alone for the fee.

Here are two other propositions of law:

"She says, that the defendant is her lawyer and creditor, and is therefore unfit to be trustee, but he was such a creditor before he became trustee, and this does not make him unfit.

"Prevost *v.* Gratz, 6 Wheaton, 418.

"Justice Washington's Opinion *in notis.*"

"The fact that he was her lawyer, rather works in his favor, for he is subject as such to the same disabilities respecting any dealings in the property that the trustee would be.

"Zeigler *v.* Hughes, 55 Ill., 288."

In Prevost v. Gratz, this Court held that there was no reason why a creditor, who, after he is so, becomes trustee for his debtor, by that act impairs or affects rights *that he had antecedently acquired against him.* But, if the trustee buys in debts, the benefit of the purchases belongs to the cestui. This does not apply where a fair bonâ fide creditor became so, before becoming trustee.

The question there was not as to the propriety of the trustee continuing to be trustee. We do not pretend that Mr. McPherson *lost* any rights as creditor by becoming trustee; but that he could not gain any new right or security as creditor-lawyer, by becoming trustee and receiving the $38,000 bond as trustee.

In Zeigler v. Hughes, it is said: "Sound policy demands that there shall be no inducements, on the part of any one occupying this important relation, for selfish scheming to make private gain out of the subject of his professional employment."

Worrall v. Johnson, 2 Jac. & Walk., 216, is cited by the counsel for the appellant, on the subject of attorneys' liens on papers. What is said there is, that papers which give a solicitor his lien, give the same right after the suit has been prosecuted with success, as when they were antecedently in his hands. To decide otherwise would be exceedingly mischievous, in discouraging a solicitor's exertions for his client. . . . "THE MONEY HERE," the Court said, "IS THE FRUIT OF THE DEED; and it can only be recovered through the medium of the deed."

We don't think that solicitors need, for a spur to incite them to exertions for their client, that when the service is ended, they should become trustees for them on sales of lands, and getting the purchasers' notes as trustees, retain them by a solicitor's lien.

Russell's Case, 1 Kenyon, 129, was a rule against an attorney to show cause why he detained deeds confided to his care. Nothing was involved as to a *lien*.

In re Murray, 1 Russell, 519, was an order on a solicitor to deliver deeds and papers on payment of his bill of costs. They had come to his hands as solicitor in the suit.

Some statements in regard to the facts, made by the counsel for the appellant, in his argument in the Court below, require a moment's notice. They are these:

1st. That the appellant says that the *notice* which he gave Ford applied only to the payment of *principal*.

This statement was incorrect. In the *testimony* of Mr. McPherson, which the same counsellor personally attended to taking, that gentleman said: "The notice, however, *was not confined to the interest;* but was simply a notice *to pay nothing* to Mrs. Cox." (Record, 80.) And in his answer to the original bill he said, "I gave notice to Mr. Ford that we had a lien upon the bond, and had possession of it as security for our fee, *and that he must make* NO FURTHER PAYMENT to her on account of it, until our lien was satisfied." —(Record, 13.)

2d. He charges her with swearing falsely in regard to Ford not paying her $880 of the interest due in November, 1872, on account of the prohibition by Mr. McPherson; and it does appear that this prohibition had been given before the 20th of March, 1873, and that on the 27th of that month, before the interdict was raised, Ford did pay her a check on account of the interest. It is nothing unusual to forget the date of a payment; and what is certain is, that, having laid the interdict before the 20th of March, Mr. McPherson that day asked her for "the balance of borrowed money due" (which she afterwards paid, on the 23d of May) and he admits that after giving the order not to pay her, he reminded Mr. Ford of it,—probably because the latter *had* given her the check notwithstanding the interdict.—(Record, 38, 88, 80.)

It is true that Mr. Ford said he had not paid the arrears of interest, through the courtesy of Mrs. Cox, and because he had not the money. But he said this *on the 17th of January*, 1874, and in reply to the question why the interest was *then* in arrears.—(Record, 39.)

3d. He charges her with "reckless swearing," because she alleges in her bill that Mr. McPherson shamefully neglected his duty in doing nothing to compel payment of taxes on the land, or redemption of part of it that the vendees had permitted to be sold for taxes.

Now this appellant claims, through his counsel, to be under the same disability to resign, and to possess the same privileges and prerogatives, when the question is of displacing him, as a trustee charged by will or deed with the most active, important, and beneficent trusts, for infants or married women, in the control, management, and disposition of lands or of a fund; and accuses of perjury his cestui, because she says that it was his duty to take care that the taxes should be paid. The deed imposes on him no such duty, he says, as he says it imposes on him no duty to see that the debtors pay the interest as it accrues, and as he swears that the deed from Pike imposed on him no duty to see to the buildings being insured, although the policies were to be put in the hands of him and his co-trustee, and the covenants to keep the buildings insured were made with them as trustees.

The deed conveyed the land to Mr. McPherson and Jesse B. Wilson, and the survivor of them, upon these trusts: to permit the debtors to enjoy until default in payment of the principal, or of some installment of interest: on payment of an installment of the principal, to release so much of the land; on full payment to release the whole,—on payment of principal and interest "and all other proper costs, charges, commissions, and expenses, incurred in pursuance of this trust:" and on default in payment of the principal, *or of* ANY *interest due on the same*, to sell;—not, to sell on demand or request of Mrs. Cox, but to sell on default.

As the debtors were to use and enjoy, receiving all the fruits, until default, of course they were bound to pay the taxes. These were charged on the land; and if they failed to pay them, there was default, and the trustees were bound to sell. Mr. McPherson held the bond; he had been the cestui's counsellor, solicitor, and adviser: when she should collect the principal, she was to pay him and his partner $2,500, (*he* claims, $5,000,) out of it. And *we* say that in *our* opinion, he *was* bound as trustee to see the taxes paid, to exact payment of the interest to or for her regularly, (to

receive and *collect* it for her, *because* he held the bond,) and to keep the buildings insured; and that he did, in *all* these respects wrongfully neglect his duty as trustee. *He* was peculiarly *her* trustee; for *she* selected *him:* and the fact that he voluntarily received and held, jointly with his co-trustee, (selected by the debtors,) the legal title and ownership, *made* it his duty to do all these things.

If *he* had purchased the land, when it was sold for the taxes, could he have held it? Why not, if he had no duty to perform until he might be called upon to sell? Why not, if she alone was bound, and he was not, to see that the taxes should be paid? Is it his idea, that he could have no *duties* to perform, because no payment in money for their performance was stipulated by him? Mandatum, nisi gratuitum nullum est; nam originem ex officio, atque amicitiâ trahit: contrarium erga est officio merces: interveniente enim pecuniâ, res ad locationem et conductionem potiùs respicit.—(PAUL, *L.* 1, § 4, *ff., mandati vel contra* (*Dig.* xvii., i., 1, § 4.)

Et si susceptum non impleverit, tenetur.—(PAUL, *L.* 5, § 1. *Same title.*)

But there may still be a mandate, si remunerandi gratiâ intervenit, ULPIAN says, in *L.* 6, *princip., same title:* and PAUL says; sicut liberum est, mandatum non suscipere, ita susceptum consummari oportet, nisi renuntiatum sit.—(*L.* 22, § 11. *Same title.*) And Gaius says; Qui mandatum suscepit, si potest id explere, deserere promissum officium non debet; alioquin, quanti mandatoris intersit, damnabitur. Si verò intelligit explere se non posse, id ipsum, cùm primùm poterit, debet mandatori nuntiare, ut is, si velit, alterius operâ utatur. Quòd si, cùm possit nuntiare, cessaverit, quanti mandatoris intersit, tenebitur. Si aliquâ ex causâ non poterit nuntiare, securus erit.—(*L.* 27, § 2. *Same tit.*)

And this trustee would, of course, have been entitled to reimbursement of any expenses in good faith incurred. Impendia, mandati exsequendi gratiâ facta, si bonâ fide

facta sunt, restitui omni modo debent: nec, it is added, ad rem pertinet, quòd is qui mandasset, potuisset, si ipse negotium gereret, minus impendere.—(*Same L.*, § 4.)

Obligatio mandati, consensu contrahentium consistit.—PAUL, *L.* 1, *princ. same tit.* When one takes upon himself a certain character, or assumes a certain name or title, or undertakes a particular *office*, the law imposes on him certain duties, because the obligation to perform them is inherent in the nature of the character or office, and is proven by the name. A will need not define the duties of its executor. The land conveyed in trust is *entrusted* to the trustee. He is therefore to take care of it and preserve it. If a flock or perishable articles of any kind are *entrusted* to one, and possession given him, to the end that upon a certain default of payment he shall sell, can he safely *neglect* the property in the meantime, permit it to be stolen, or to be sold and lost on account of unpaid taxes?

Did this trustee inform the woman who selected him to be trustee, that he should not consider himself bound to pay any more attention to the land than if it did not exist, or to her interest in it than if she had none, until she should require him to sell, upon a default? He does not pretend to have done so: Debebat illæ nuntiare, ut ea, si vellet, alterius operâ usus esset. If he had given her that notice, it is to be presumed that she would have found another trustee, and another legal adviser.

And whatever a debauched public opinion may now sanction, we think that the practice of men who become trustees merely to sell, to stipulate five per cent. as commissions for selling, and two-and-a-half per cent. for merely advertising, when no sale follows, is more and worse than extortion; and that no court ought to lend its aid to enforce such a contract; but every one ought, on the contrary, to reprobate it. Trustees, auditors, and commissioners are verily the togati vultures, who infest the community, and bring shame upon the law and the Courts.

4th: The counsel, in more words than it is necessary to repeat, accuses the appellee of false swearing, in averring that she did not know at the time, nor until after her bill was filed, that in addition to the eleven notes of Pike to Holden and Ford, which were delivered to her, there were three others, which she did not know of, due a year sooner than any of hers, in the hands of other persons. And he says, "she swears that because of it she consulted counsel to file a bill to remove the trustee." Not at all. She swears in her amendment to her bill that she knew nothing of these notes, until she with astonishment learned their existence, after filing her bill.

She did say, in her testimony (Record, 57), "Believing my trustee antagonistic to my interest, losing all confidence in him, I [had] consulted counsel [who] filed a bill in equity, praying for his removal as trustee." The words *had* and *who* are omitted. She had before said that, after learning from Benedict about the three notes, having before then never seen the deeds of trust, she said to him, "Put it on paper, that I may carry it to my counsel;" and then added the sentence quoted above, in explanation of the words "my counsel." The bill was filed on the 11th of June, 1873; and Mr. Benedict says (Record, 42), that the conversation between himself and her about the notes was in the summer of 1873. The amendment, in which they were first spoken of in the case, was filed on the 27th of June, and the letter of Benedict to her, informing her that he represented parties holding two notes, is dated 16th June, 1873.

Upon the question whether she *knew* at the time when they were made, anything about the notes, much testimony is on the record, because it raised a direct question of veracity between her and Mr. McPherson. And if "her own witnesses prove that the notes, the existence of which she swears was kept secret from her, were executed, endorsed, and delivered *in her very presence*," or if, as Mr. McPherson swears, "they were drawn, signed, endorsed, passed, and

the whole of it took place within eight feet of where Mrs. Cox was sitting," that does not prove that she knew that three notes for $1,000 each, due at two years, were made and delivered, besides those which were handed to *her*, and that these were secured by the same deeds of trust. All that the testimony of Ford, Pike, Benedict, Holden, and Storrs proves, is, that it was possible for her to know that other notes were made than those that she received, *because* she was in the room where they were made. There is not in their testimony the least proof that she really knew it, that she was informed that such notes were to be made, or that she heard anything about such notes at the time, or saw any such notes delivered.

Mr. McPherson testifies that Mrs. Cox would not submit to the discount which the sale of notes would involve, and therefore she would not take *all* the notes; and therefore Holden undertook it; and he believes that she understood every item of the arrangement. He does not pretend that she was informed *by him*, or *knew* that three notes, due a year before any of hers, *were secured by the same deeds of trust on her own land*; and as he might have omitted telling her, supposing, as he says, that she understood it all; and as neither he nor any other witness disproves her statement that she did *not* know of these notes, which Benedict strongly corroborates, the charge of perjury, for that statement, was not very fit to be made. As the transaction was certain to involve her in great trouble, if these notes should not be paid, because the holder of either of them could compel her to consent to a sale of the property, or to become owner of his note, (as actually has happened,) it is strange that Mr. McPherson should have contented himself with taking it for granted that she knew all about it. There is no need of inferring perjury on either side, as to *this* matter, at least. It is at least certain that her legal advisor and trustee did not advise not to consent to that arrangement, in order to collect moneys overdue, part of which she was to pay over to him.

5th. As to the insurance, it is certain that she found the houses uninsured, and had to insure them herself; and that Mr. McPherson did not consider it his duty to see to their being insured, and never did do so. All the rest, about their being insured for a year, he does not prove; for he says: "My impression is that the policies run for a year; but I do not know how I got the impression; they may not have been for such a length of time." The insurance agent, Pratt, states that the buildings on the three lots were separately insured, on the 4th and 19th of October and 16th of November, 1871, each having a year to run. They were issued for a year, with privilege of finishing, which is called *a builder's risk*, for which an additional premium was paid, the privilege expiring in one month from date of issue, renewable from month to month by payment of the same monthly premium. Two were canceled 17th May, 1872 (i. e., one in less than 7½ months, the other in six months; and the third ran to its full term, i. e., to October 4, 1872.) The deeds of trust from Pike were made in January, 1872; and by each he bound himself to *keep* the buildings insured, each for $3,500, and to assign the policies to the trustees. He told Mrs. Cox that he had placed $150 in Mr. McPherson's hands, wherewith to keep the buildings insured. The latter denies this, and objects that she does not say that she believed the statement. That is unimportant; but it is proper to say that she did *not* believe it after Mr. McPherson's denial, nor *very* implicitly at first.

She stated in her testimony that the houses were left uninsured for fourteen months. The counsel of Mr. McPherson endeavored to show by cross-examination that this was not true; but it was, for two of the policies expired in May, 1872, and her suit was brought in June, 1873, and it was some time after that before *she* insured the houses.

She does *not* say she found the companies had failed. She says that Mr. Hanson told her that "three or four of the companies had broken, and two had not."—(Record, 63.)

The counsel says that by a letter of Mrs. Cox, produced

by Mr. McPherson, it appears that Mr. Holden "had an interview with Mr. Cox, *in which he submitted a proposition, and such conclusions were arrived at*," that she *instructed* Mr. McPherson and Mr. Carlisle to carry out the arrangement, provided only that she was made secure, of which they were *allowed* to judge.

Now, the letter (Record, 85) reads: "Col. Holden has just left, *and tells me you approve* and think perfectly safe his offer to pay" so and so. "*If such is your understanding of the matter*," (i. e., if he has stated the arrangement made with *you* correctly,) "I am willing to affix my name, if I am *perfectly safe and secure*," (so italicized,) of which you and Mr. C. must be the judge."

The counsel applied to Mrs. Cox the maxim *falsus in uno, falsus in omnibus*, because she said in a letter to Messrs. Carlisle & McPherson, (Record, 89,) that the fee she offered was just half of $5,000, "and was to be paid out of the proceeds of the sale of the property, as such proceeds should be realized;" and in her testimony, said, "I expected to pay $2,500 for the recovery of the rent and the square;" and being asked "And not as the same should be realized on the sales made of the property?" she said "I did not so understand it."—(Record, 62.)

The declaration in the rent suit shows, he says, that no rent was due when the bargain was made; and there was no reason to think that the rent would ever have to be sued for, for it had been paid up to that time."

As rent would accrue during the suit to enforce the forfeiture, and it was natural to suppose that after receiving notice that the right to purchase was forfeited, Angus and Lewis would pay none, it is equally natural to suppose that recovery of rent *was* contemplated at the time of the bargain; and if Mrs. Cox did not suppose that the fee she offered would cover all services, why was nothing said upon that subject. It is not pretended that there was any agreement as to a separate fee for rent or damages. *Accessorium sequitur principale*. She is not endeavoring "to import into

the contract" the fee for the recovery of rent. She makes no reclamation for the commissions he retained, upon the collection. She only says that she did not think any should have been claimed; while he demands commissions on the $1,500 paid after the equity suit was brought.

The most naïve notions of the counsel are these:

"If a contingent fee is to be entertained, you cannot apply to it any scale of measurement. It cannot be *extortionate* if agreed upon before the commencement of litigation and it cannot well be *exorbitant* when agreed upon beforehand by the parties themselves."

After all, it is perhaps the wisest plea that the defender can interpose for his client; that though a lawyer, who esteemed his services in an easy ejectment case, worth to a poor widow "striving to maintain her children, and struggling with the hard business of the world," the sum of five thousand dollars, with an added thousand for assistant counsel, yet *he did not know* (for if he knew, would he not have enlightened his client?), that it is precisely when the client is under the influence of fear and apprehension, *at the beginning of* or *during* the litigation, that large contingent fees *are* exorbitant and extortionate in the eyes of the law; and that a fee is none the less *exorbitant* because the parties agreed on it.

The decree put aside everything but the single fact that the claim for a fee was in conflict or inconsistent with the defendant's duty as trustee; and we were quite willing it should be placed on that ground. We think that to *retain* the suit, *i. e.*, not to put Mrs. Cox in possession of her bond, until the question of indebtedness and lien are tried somewhere, was erroneous; but we took no appeal. It would have been better for the appellant if he had taken none.

ALBERT PIKE.
ROBERT W. JOHNSON.
L. H. PIKE.
Of Counsel for the Appellee.